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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1886.**

No. ~~370~~. 105

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

*vs.*

W. C. BRADBURY AND P. F. RINEHART, PARTNERS, UNDER THE FIRM-NAME OF BRADBURY AND RINEHART.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

**FILED OCTOBER 1, 1886.**

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## OCTOBER TERM, 1888.

No. 379.

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IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

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a Supreme Court, Idaho Territory.

W. C. BRADBURY *et al.*, Pl'ff- & Respondent-,

*vs.*

IDAHO & OREGON LAND IMPROVEMENT CO., Def't & Appellant.

Appeal from the second judicial district, Alturas county.

Huston & Gray, attorneys for respondent-; F. E. Ensign and J. H. Crichton, attorneys for appellant.

Filed January 4th, 1886.

A. L. RICHARDSON, *Clerk.*

1 *Complaint.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart,

*vs.*

THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation.

The plaintiffs complain and allege:

1st.

That at the times hereinafter mentioned they were partners engaged in railroad and other construction, as contractors, under the firm name and style of Bradbury & Reinhart.

2nd.

That at the time hereinafter mentioned the defendants were and still are a corporation organized, as plaintiffs are informed and believe, under the laws of the State of Colorado, and having an office in the town of Hailey, in said Alturas county, Idaho Territory.

3rd.

That on the 13th day of April, 1883, the plaintiffs, as such partners as aforesaid, made and entered into a contract with
2 the defendant corporation to construct for said corporation, near the town of Hailey aforesaid, a certain ditch, a copy of which contract is hereto annexed, marked Exhibit "A," and forms a part of this complaint, and reference is thereto had.

4th.

That on the 17th day of May, 1883, and before the completion of said ditch, and by and with the consent of the parties thereto, an amendment or supplement was made to said contract by the parties thereto, a copy whereof is hereto annexed & marked Exhibit "B"

and made a part of this complaint, and reference to which is hereby made.

5th.

That on the first day of June, 1883, the plaintiffs having completed said ditch in accordance with the terms and conditions of said contract and the supplement or amendment thereto, and said ditch having been accepted by said defendant under the terms of said contract, the plaintiffs came to a settlement with defendant of and concerning the said contract and the work and labor done by plaintiffs thereunder and in fulfillment thereof.

6th.

3 That upon said settlement it was ascertained, agreed, and understood by and between the plaintiffs and the defendant that there was due and unpaid from the defendant to the plaintiffs upon said contract & for the work and labor done & performed by plaintiffs thereunder the sum of sixteen thousand seven hundred and seventy-four dollars and forty-nine cents (16,774.49).

7th.

That in payment of said sum of sixteen thousand seven hundred and seventy-four dollars and forty-nine cents, so as aforesaid ascertained and agreed to be due from the defendants to the plaintiffs as aforesaid, the defendants did make, execute, and deliver to the plaintiffs on said last-named date the said defendants' check upon the banking-house of T. R. Jones, at Hailey aforesaid, for the sum of five thousand dollars; its, said defendants', acceptance, at four days, for the sum of five thousand dollars, and its, defendants', acceptance, at fifteen days, for the sum of six thousand seven hundred seventy-four dollars and forty-nine cents.

8th.

4 That said bank check was paid upon presentation and said acceptance — defendant at four days was paid at maturity, but that said acceptance of defendant, at fifteen days, for said sum of six thousand seven hundred and seventy-four dollars and forty-nine cents, although duly presented at maturity, was not paid, nor has the same nor any part thereof been paid, and that on the 27th day of June, 1883, the same was duly protested for non-payment, and on the — day of July, 1883, plaintiffs received notice from defendants that it refused to pay said acceptance.

9th.

That there is now justly due and owing to plaintiffs from defendant upon said contract and upon said settlement the sum of six thousand seven hundred and seventy-four dollars and forty-nine cents and interest thereon at the rate of 1½ % per month from the 9th day of June, 1883.

10th.

That it being the plaintiffs' intention to avail themselves of the benefits of the provisions of chapter 48 of the Code of Civil Procedure of Idaho Territory, entitled "Enforcement of Liens," and
5 perfect a lien upon the premises aforesaid, and hereinafter described, as a security for the payment of the claim so due to plaintiffs from defendants aforesaid, and to claim and hold such lien upon said ditch, together with a convenient space about the same, or so much as might be required for the convenient use and occupation thereof, or upon such interest as the defendant, who caused said ditch to be constructed, had therein on the 1st day of June, 1883, and before the expiration of sixty days next ensuing the completion of said ditch as aforesaid, the said plaintiffs did file, on the 12th day of July, 1883, and after performance of said contract and completion of said ditch, with the recorder of the county of Alturas, wherein said premises are situated, their claim, containing a true statement of their demand against the defendant, after deducting all just credits and offsets, with the name of the owner or reputed owner thereof; also a description of the property to be charged with said lien, sufficient for identification, duly verified by the oath of W. C. Bradbury, one of the plaintiffs.

11th.

6 That said claim was for constructing a ditch near the town of Hailey, in the county of Alturas, Territory of Idaho, known as the "Hailey ditch," and described as follows: Commencing at a point near Wood river about four miles above the town of Hailey, Alturas county, Idaho Territory, at the foot of the first bench, and extending upon and along said bench to a point about two miles below said town of Hailey.

12th.

That the said ditch was, at the time said work was commenced and until the time of filing the notice of the lien therein mentioned, the property of defendant.

13th.

That ninety days have not elapsed since the filing of said lien.

14th.

That five hundred dollars is a reasonable amount for counsel fees in this action.

Wherefore said plaintiffs pray judgment directing the sale of the premises above described, to the extent of the right of the defendant therein, on the first day of June, 1883, by the sheriff of said
7 Alturas county, according to law and the practice of this court, and directing that the proceeds of such sale be applied to the payment of the costs of these proceedings, reasonable counsel

fees, and to the payment of said plaintiffs' claim as aforesaid, amounting to the sum of six thousand seven hundred & seventy-four dollars and forty-nine cents, and for twenty per cent. damages, as provided by the statutes of Idaho Territory, and interest thereon from June 9th, 1883, at 1½ % per month; also for the payment of the claim of any other lien holder or holders on said property, if any such there be, who shall come in and duly be made parties to this action, and that plaintiffs may have judgment against defendant for any deficiency in the satisfaction of the amount due thereon on sale of said ditch, and for such other and further relief as may be just in the premises.

HUSTON & GRAY,
*Att'ys for Pl'ffs.*

TERRITORY OF IDAHO, }
*Ada County,* } ss:

Jo. W. Huston, being duly sworn, says he is one of the attorneys of the plaintiffs in the above-entitled action; that he has
8 read the foregoing complaint and knows the contents thereof, and that the same is true as he is informed and believes; that his information is derived from the statements of the plaintiffs, the letters of the defendant, and the papers in the case; that he makes this verification as the attorney of plaintiff-, because neither of the plaintiffs are now residents of or within Ada county, I. T., where their attorneys reside.

JO. W. HUSTON.

Subscribed and sworn to before me this 19th day of September, 1883.

A. L. RICHARDSON, *Clerk,*
By SOL. HASBROUCK, *Deputy.*

9 EXHIBIT "A."

This agreement, made and entered into this thirteenth day of April, 1883, by and between Bradbury & Reinhart, of Alturas county, the first party, and the Idaho and Oregon Land Improvement Company, the second party, witnesseth: That the said first party, in consideration of the covenants and agreements of the second party hereinafter contained, covenants and agrees to and with the second party to excavate & construct a ditch for the second party, to commence at a point near Wood river about four miles above the town of Hailey, at the foot of the first bench, to be selected and designated by the engineer in charge of the construction of said ditch, to be appointed by said second party, to be constructed along the line to be selected and designated by said engineer, and to be not less than four miles long and at the agreed price of thirty-two and one-half cents (32½c.) per cubic yard for all material moved in the construction of said ditch, the said ditch to be of the following dimensions, to wit, eight (8) feet wide at the bottom, two (2) feet at

its shallowest point, with a grade of three (3) feet per mile throughout its entire length, and the ditch to be so constructed
10 that each of its sides shall slope outward and upward at the rate of one (1) foot for each foot in depth, the said first party to commence work on said ditch as soon as practicable and to complete the same on or before the first day of July, 1883.

Any dirt or material that shall, under the direction of said engineer, be moved over one hundred (100) feet in the construction of embankments or for other reasons shall be paid for at the rate of four (4) cents per cubic yard for each and every hundred feet moved, in addition to the price of thirty-two and one-half (32½c.) cents hereinbefore mentioned; and the said second party, in consideration of the covenants and agreements herein contained, covenants and agrees to and with said first parties to pay said first parties for said work at the rate of thirty-two and one-half (32½c.) cents per cubic yard for all material moved from or in construction of said ditch, payment therefor to be made as follows: Estimates of the amount of work done to be made at the end of each calendar month by the engineer in charge, and payments for each month's work to
11 be made on or before the tenth day of the following month by said second party, at the banking-house of T. R. Jones, at Hailey, in the said county and Territory, less ten per cent. of the amount due, which last-named amount is to be retained until the completion of the said ditch according to the terms of his contract and its approval by the engineer in charge. The foregoing provisions of this contract are not to apply to any material that will require blasting to remove, nor to low and boggy ground, nor ground which will require clearing or grubbing.

This contract is not intended to include any fluming, but only earth excavations and embankments.

In witness whereof the parties to this instrument have hereunto set their hands & seals the day and year first above written.

BRADBURY & REINHART. [SEAL.]
THE IDAHO & OREGON LAND IMPROVEMENT CO., [SEAL.]
By W. G. CASE, *Vice-Pres't.*

Witness:
WILLIAM CASE.

12 EXHIBIT "B."

*Supplement.*

It is agreed that the contract of Bradbury & Reinhart with the I. & O. L. Improvement Co., dated April 13, '83, shall be amended and modified as follows: All excavations from the head of the ditch to station # 43, which it is agreed shall include all the work to be classified as low and boggy ground or as loose rock, to be paid for at 70c. per cubic yard, and all work requiring blasting is to be paid for at $1.60 per cubic yard; and for all the clearing & grubbing

B. & R. shall keep a force [full] account of time, labor, and expenses of same, which amount, together with ten per cent. (10%) added for profit, shall be paid to said B. & R. in full for such clearing & grubbing, and all the remainder of the work shall be settled for at 32½c. per cubic yard, as per contract.

In testimony whereof the parties of the original contract have set their hands this 17th day of May, A. D. 1883.

BRADBURY & REINHART.
IDAHO & OREGON LAND IMPROVEMENT CO.,
By ROB'T E. STRAHORN, *Gen. Man.*

Witness:
H. C. WALLACE.

13 (Endorsed:) District court, Alturas county, I. T. Bradbury & Reinhart, pl'ffs, *vs.* I. & Oregon L. Imp't Co., def'ts. Complaint. Filed Sept. 24, 1883. A. L. Richardson, clerk, by E. E. Richards, deputy. Huston & Gray, for pl'ffs.

14 *Demurrer.*

TERRITORY OF IDAHO, }
*County of Alturas,* }

In District Court, 2nd Judicial District.

W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

Now comes the said defendant and demurs to the complaint of the said plaintiffs, filed herein, on the ground following, to wit:

That the said complaint does not state facts sufficient to constitute a cause of action. Wherefore defendant prays to be dismissed hence with his costs.

F. E. ENSIGN,
*Att'y for Defendant.*

15 (Endorsed:) In district court, 2nd judicial district, Alturas Co., Idaho. W. C. Bradbury *et al.*, pl'ffs, *vs.* Idaho & Oregon Land Improvement Co., def'ts. Demurrer. Filed Oct. 15th, 1883. A. L. Richardson, clerk. Certified copy of the within sent by mail to Messrs. Huston & Gray, Boise City, Idaho T'y. E. E. Richards, deputy clerk.

16 *Order Overruling Demurrer.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

Present: Hon. Case Broderick, presiding judge.

June term, A. D. 1884. Thursday, June 12th, 1884.

W. C. BRADBURY *et al.*
*vs.*
IDAHO & OREGON LAND IMPROVEMENT COMPANY.

On this day the defendant's demurrer to the complaint herein was argued by F. E. Ensign, Esq., for the def't, & Jo. W. Huston, Esq., for the pl'ffs; after which, the court being fully advised in the premises, ordered that said demurrer be, and the same is hereby, overruled, and that said def't have until the 17th inst. to answer.

17 *Answer.*

TERRITORY OF IDAHO,
*County of Ada.*

In District Court, 2nd Judicial District.

W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

The said defendant, in answer to the complaint of plaintiffs filed herein, denies that on June 1st, 1883, or at any other time, plaintiffs completed the ditch described in said complaint in accordance with the terms or conditions of the alleged contract and the alleged supplement or amendment thereto, copies of which, marked Exhibits "A" & "B," are annexed to and made a part of said plaintiffs' complaint, and denies that the said ditch was ever accepted by said defendant.

Denies that there is now due and owing to plaintiff from defendant upon said alleged contract or any settlement made between them the sum of $6,774.49, and that there is now due or
18 owing to plaintiffs thereon any sum in excess of five hundred dollars. And the said defendant, in further answer to said complaint, alleges that if a settlement with said defendant was ever made by plaintiffs of or concerning the alleged contract or the work or labor done thereunder or in fulfillment thereof, or if in any such settlement it was ascertained or agreed that there was due or unpaid upon said contract, for the work or labor done by plaintiffs there-

under, the sum of $16,774.49, or if in payment of said sum the check and acceptances described in said complaint were made by defendant, the said settlement was made and the said check and acceptances were executed under a misapprehension of the facts caused by the false and fraudulent statements and misrepresentations of the plaintiffs that the said ditch was completed in accordance with the alleged contracts set out in the complaint, which said false and fraudulent statements & misrepresentations of plaintiffs were believed by defendant and caused defendant to make such settlement and execute said check and acceptances, and defendant would not have made such settlement or executed said check or acceptances
19 had defendant then known the truth.

Wherefore defendant prays that the plaintiffs have judgment herein for a sum not exceeding five hundred dollars.

F. E. ENSIGN &
J. H. CRICHTON,
*Att'ys for Def't.*

TERRITORY OF IDAHO, }
*County of Alturas.* }

Hugh C. Wallace, being duly sworn, says that he is the secretary of the said defendant corporation; that he has heard the said answer read and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

HUGH C. WALLACE.

Subscribed and sworn to before me this 19th day of June, 1884.
A. L. RICHARDSON, *Clerk.*

20 (Endorsed:) In district court, 2nd judicial dist., Alturas Co., Idaho. W. C. Bradbury *et al. vs.* The I. & O. L. I. Company. Answer. Filed June 19th, 1884. A. L. Richardson, clerk. Delivered a copy to R. Z. Johnson June 19th, 1884.

21 *Special Findings by the Jury.*

In the District Court for Alturas County, Idaho Territory.

W. C. BRADBURY *et al.*, Pl'ffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Def't. }

[On margin:] These questions from 1 to 8, inclusive, submitted.

Special findings by the jury asked by the plaintiffs:

1st.

Was the ditch constructed upon the survey made by the engineer in charge employed by the defendant corporation? Yes.

2nd.

Did the dimensions of the ditch as laid out by the engineer in charge vary from the dimensions as stated in the written contract? Yes.

3rd.

Were the variations or changes in the dimensions of the ditch as laid out by the engineer in charge from those stated in the contract made before the work of construction was commenced? Cannot agree.

4th.

22 Were the changes or variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction? Yes.

5th.

Was the ditch accepted by the defendant corporation, and have they appropriated and used it ever since such appropriation and acceptance? Cannot agree.

6th.

Was there a settlement between the plaintiffs and defendant on the 9th day of June, 1883? Yes.

7th.

What amount was found to be due to plaintiffs from defendant upon such settlement? 16,774.49.

8th.

Did the defendant, by its general manager, R. E. Strahorn, give its acceptance to plaintiffs for the sum of $6,774.49 upon such settlement? Yes.

(Endorsed:) Questions by pl'ff- submitted. Filed July 1st, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy.

23 *Virdict.*

District Court, Alturas County.

BRADBURY & REINHART, Pl'ffs,
*vs.*
IDAHO & O'G'N LAND IMP'T CO., Def't.

We, the jury in the above-entitled action, do find for plaintiff- for 4,274.49 and 20 % and interest from date of acceptance.

Hailey, June 30th, 1885.

J. F. CLIFF, *Foreman.*

(Endorsed:) Virdict. Filed July 1, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy.

24 *Findings of Fact & Conclusions of Law.*

In the District Court, Second Judicial District of Idaho Territory in and for the County of Alturas.

W. C. BRADBURY *et al.*, Pl'ffs, *vs.* THE I. & O. L. IMP'T CO., Def't. } Findings of Fact and Conclusions of Law.

This cause came on regularly to be heard before the court with a jury, and, after hearing the pleadings, proofs, and arguments of counsel, the case was submitted to the jury upon written and oral instructions by the court and upon special issues, and the jury, after due deliberations, having found in favor of the plaintiffs upon all the material issues submitted to them, and said findings being adopted by the court and made a part hereof, the court therefrom makes the following findings of fact:

1st.

That the ditch contracted to be constructed for defendant by plaintiffs was constructed as contracted, except as to certain changes in dimensions of the same, which changes were made with the knowledge and assent of the vice-president and general manager of the defendant and before the execution of supplemental written
25 agreement, a copy of which is attached to plaintiffs' complaint.

2nd.

That when completed said ditch was accepted by the defendant, through its general manager, and has ever since been appropriated and used by the defendant.

3rd.

That after said acceptance of said ditch by defendant plaintiffs and defendant came to a settlement; that settlement was based upon the estimates and measurements made by the engineer of defendant in charge of the construction of said ditch; that there was no fraud or misrepresentations on the part of plaintiffs in or concerning said settlement.

4th.

That upon said settlement there was found & agreed to be due to the plaintiffs from defendant for the construction of said ditch the sum of $16,774.49.

5th.

That said settlement was had on the 9th day of June, 1883, and in payment of the sum so found to be due from defendant to
26 plaintiffs the defendant paid to the plaintiffs the sum of five thousand dollars in cash and executed to plaintiffs it accept-

ance for the sum of five thousand dollars at 4 days, and for the sum of $6,774.49 at 15 days, with interest at the rate of one per cent. per month; that the first of said accep-tions was paid at maturity; that said acceptance of defendant for the sum of $6,774.49 has not been paid, nor has any part thereof; that on the 27th day of June, 1883, said acceptance of defendant for the sum of $6,774.49 was duly protested for non-payment.

6th.

That the lien of plaintiffs set forth in their complaint was duly filed according to the statutes of Idaho Territory.

From which facts the court finds the following:

1st.

That the plaintiffs are entitled to a judgment for the sum of ten thousand one hundred and seven dollars and fifty-two cents, & for costs, which includes the sum found due, interest, and protest damages.

2nd.

That plaintiffs are entitled to a decree of foreclosure of the
27 lien set forth in their complaint, and it is so ordered.

To all of which findings and conclusions the defendants object and except*s*.

July 8th, 1885.

CASE BRODERICK,
*District Judge.*

(Endorsed:) District court, Alturas county, I. T. W. C. Bradbury *et al.*, pl'ffs, — I. & O. L. Imp't Co., def'ts. Findings of fact and conclusions of law. Filed July 8th, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy. Huston & Gray, for pl'ffs.

28 *Decree.*

In the District Court of the Second Judicial District of the Territory of Idaho in and for the County of Alturas.

| | |
|---|---|
| W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs, | Decree of Foreclosure and Sale. |
| *vs.* | In Open Court, July 7th, A. D. 1885. |
| THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant. | |

This cause having this day been brought on to be heard upon the complaint filed therein and upon the answer filed thereto by the defendant, and upon due proof of the filing of the lien set forth in plaintiffs' complaint in the recorder's office of said Alturas county on the 20th day of July, 1883, at 2 o'clock p. m., and upon the proofs, records, and evidence produced by the respective parties, and the

court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court from the proofs herein that there is now due to the plaintiffs from the said defendant the sum of ten thousand one hundred and seven dollars & fifty-
29 two cents for principal, damages, and interest upon the debt mentioned and set forth in the complaint of plaintiffs, which sum is to draw and bear interest, at the rate of ten per cent. per annum, from the date hereof, and that all the allegations in the said plaintiffs' complaint contained are true: Now, on motion of Huston & Gray, of counsel for the plaintiffs, it is adjudged and decreed that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiffs for the principal, damage, and interest and costs in the suit and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff of the county of Alturas, where said premises are situated; that said sale be made in said Alturas county; that the said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution, and that the plaintiffs or any of the parties to this suit may become the purchaser at such sale, and that the said sheriff, after the time allowed by law for redemption has
30 expired, execute a deed to the purchaser or purchasers of the premises on said sale.

That the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiffs or their attorneys, out of said proceeds, their costs in this suit, taxed at $60.50, with interest thereon from this date at the rate of 10 per cent. per annum, and also the amount so found due as aforesaid, together with interest thereon, at the rate of ten per cent. per annum, from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same; (and that the said sheriff take receipts for the amounts so paid and return the same to this court with his report of sale, and that he bring the surplus money arising from said sale, if any there be, into court within five days after such surplus shall have been received and shall be ascertained, to abide the further order of this court.)

That the defendants and all persons claiming or to claim from or under it, and all persons having liens subsequent to said lien of plaintiffs, by judgment or decree upon the premises described
31 in said lien, and his or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree and their heirs or personal representatives and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said lien with the recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said premises covered by said lien and every part and parcel thereof from and after the delivery of said sheriff's deed.

And it is further adjudged and decreed that the purchaser or pur-

chasers of said premises covered by said lien at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises or any part thereof.

And it is further adjudged and decreed that if the moneys
32 arising from said sale shall be insufficient to pay the amount so found due to the plaintiffs as above stated, with interest and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due to the plaintiffs in his return of said sale, and that on the coming in of said return a judgment of this court shall be docketed for such balance against the defendant corporation, and that the defendant corporation, which is personally liable for the payment of the debt secured by the said lien, pay to said plaintiffs the amount of such deficiency and judgment, with interest thereon at the rate of 10 per cent. per annum from the date of said last-mentioned return and judgment, and that the plaintiffs have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the complaint and lien above referred to in this action, are as follows, to wit:

That certain ditch known as the "Hailey ditch," and commencing at a point near Wood river about four miles above the town
33 of Hailey, Alturas county, Idaho Territory, at the foot of the first bench, and extending upon and along said bench to a point about ten miles below said town of Hailey.

July 8th, 1885.

CASE BRODERICK,
*District Judge.*

34 *Notice of Motion for a New Trial.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Alturas.

W. C. BRADBURY and P. F. REINHART, Partners, Doing Business under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant.

Take notice that the defendant, The Idaho & Oregon Land Improvement Company, intends to move the court to vacate and set aside the virdict and decision of the court rendered in the above cause, and to grant a new trial of said cause upon the following grounds, to wit:

1st. Accident & surprise which ordinary prudence could not have guarded against.

2nd. Insufficiency of the evidence to justify the virdict and other decisions, and that the virdict is against law.

3rd. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made on the 1st ground above stated
35 upon affidavits hereafter to be filed and served upon you, and on the 2nd and 3rd grounds on a statement of the case to be hereafter prepared.

Hailey, Idaho, July 16, 1885.

F. E. ENSIGN AND
J. H. CRICHTON,
*Att'ys for Defendant.*

To Messrs. Bradbury & Reinhart, pl'ffs, and Messrs. Huston & Gray, attorneys for plaintiffs.

(Endorsed:) In district court, 2nd judicial district, Alturas Co., Idaho. W. C. Bradbury *et al.*, pl'ffs, *vs.* The Idaho & Oregon Land Improvement Company, def't. Notice of motion for new trial. Filed July 16th, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy. Copy of the within received July 16th, 1885. Huston & Gray, pl'ffs' att'ys.

36 *Statement on Motion for New Trial.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.
} Affidavit of Surprise on Motion for New Trial.

TERRITORY OF IDAHO, } *ss:*
*County of Ada,* }

R. E. Strahorn, being duly sworn, says: I am now and have been since May, 1883, the vice-president and general manager of defendant in said action, The Idaho & Oregon Land Improvement Company; that said action was tried at this term of said court, and a judgment rendered therein for plaintiffs for the sum of $10,107.52 & interest; that before said action came on for trial affiant was informed by defendant's counsel, F. E. Ensign & J. H. Crichton, Esqrs., that the plaintiffs would be confined on the trial to the proofs
37 & facts alleged in said complaint of plaintiffs and the exhibits attached thereto, and that they would be confined to proof of the construction of a ditch 8 feet wide at bottom and 2 feet deep, and that if the court permitted them to amend their complaint, so as to admit proof of the construction of a larger and more costly ditch, the defendant would be entitled to a continuance for the purpose of procuring the necessary witnesses to meet the new issue presented by the amendment.

That E. B. True, called as a witness for plaintiff, testified that he was a surveyor and civil engineer, and that he had surveyed the ditch after plaintiffs had completed their work, and that they had dug the ditch a large portion of its length, and particularly through the most expensive and difficult portion of its construction, 10 feet wide at bottom and 3 feet deep, and that in its construction plaintiffs had removed 31,571 cubic yards of dirt & rock, of the value, under the rates of payment set forth in the written contract attached as exhibits to the complaint, of $17,081.90.

That the judgment of the said court rendered in said cause
38 was based, so far as the amount of work done on the said ditch was concerned, upon the testimony of the said True, there being no other testimony relating to the amount of work done, and that the judgment of the court in said cause was rendered in favor of plaintiffs for the sum of $10,107.52 & interest for removing 31,571 cubic yards of dirt & rock, the principal portion of which was removed in the construction of a ditch 10 feet wide at bottom and three feet deep.

That said testimony of said True was *was* objected to by defendant on the ground that it conflicted with the allegations of the complaint and the written contracts attached thereto as exhibits, and that defendants would be entitled to a continuance to procure testimony to contradict it, and that the admission of such testimony under the pleadings was a surprise to plaintiff.

That if a new trial is granted in said cause defendant will be able to prove that the amount of dirt, earth, and rock actually removed
39 in the construction of the ditch of the size & dimensions stated in said True's testimony did not exceed 3,250 cubic yards, which will reduce the cost of constructing the ditch about $2,200 less than the amount proved on said trial.

That defendant will be able to prove the same by C. N. Sawyer, a railroad surveyor and civil engineer of great experience, who surveyed the said ditch for defendant immediately after the completion and who resides in the State of Missouri and whose testimony could not have been procured by defendant for use on said trial after the court had admitted the said evidence of said E. B. True; that affiant has been informed by said counsel and believes that if a new trial of said cause can be had and the evidence of said Sawyer given on the trial that a different and smaller verdict will result and judgment be reduced.

ROB'T E. STRAHORN.

Subscribed & sworn to before me this 1st day of August, 1885.
A. L. RICHARDSON, *Clerk*,
By E. E. RICHARDS, *Deputy*.

40 (Endorsed:) In district court, 2nd judicial district, Alturas Co., Idaho. Bradbury & Reinhart, pl'ffs, *vs.* I. & O. Land Imp't Company, def'ts. Affidavit of R. E. Strahorn on motion for new trial. Filed Aug. 1st, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy.

41 In the District Court of the Second Judicial District of Idaho Territory, held in and for Alturas County.

| | |
|---|---|
| W. C. BRADBURY and P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs, *vs.* THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant. | Statement of Defendant on Motion for New Trial. |

This is an action on contract and for the foreclosure of mechanics' lien on a certain water ditch conducting water from Wood river to the town of Hailey, Alturas county, Idaho.

The cause, having been regularly called, was tried before the court with a jury on the —.

*Testimony of E. B. True.*

E. B. TRUE was called and sworn as a witness for plaintiffs, and plaintiffs' attorney asked him the following questions:

State what you know about the construction of the ditch described in the complaint, and whether any changes were made in the size or dimensions of the ditch from that described in Exhibits
42 "A" & "B," attached to said complaint; and, if any changes were made, state by whose direction they were made.

Defendant objected to the question on the ground that the same was irrelevant & immaterial, and that no changes in the contract set out in said exhibits relating to the size or dimensions of the ditch to be constructed and no new contracts authorizing the construction of a ditch of different dimensions from that stated in said exhibits could be proven under the issues made by the pleadings.

The court overruled the objection of defendant and admitted the testimony; to which ruling of the court the defendant duly excepted.

In answer to said question the witness testified as follows:

I had considerable conversation with Mr. Case, who I understood was managing the business of the defendant at Hailey, about the ditch. I discussed with him the size and dimensions of the ditch before the contract was made with Bradbury & Reinhart, and what its size should be as it was extended down the valley towards the town of Hailey. Afterwards I read the written contract (Ex-
43 hibit "B"), and when I came to the point where it stated the dimensions of the ditch I stated to Mr. Case that I did not understand that it was to be of that size. I said to him, "You told me it was to be 10 feet wide at the bottom." He said in reply, Never mind those figures, but go on and stake out a ditch as we had before determined upon. He remarked that there were several matters in the contract which were to be left for future consideration, and I understood that this was to be one. I had several other

conversations with him about the ditch, and then went and staked out the ditch to be 10 feet wide at the bottom at the upper end, but diminished it to 7 feet wide at the bottom near the town of Hailey. I don't know whether the contract was signed at the time I saw it. I think it was not.

All of the above testimony of witness True was admitted by the court against the objection of defendant; to which ruling of the court the defendant duly excepted. The witness True also testified that the ditch was dug 2 feet wider at the bottom and 1 foot deeper than was provided for in the written contracts set up in the
44 complaint for a large portion of the way from its head to the town of Hailey, and that the ditch headed about four miles above the town of Hailey.

The witness was shown Exhibit "C," and stated that he signed as engineer in charge of the construction of the ditch, and that it was his report of the work done and expense incurred in construction of the said ditch, which he delivered to Mr. Strahorn at the time of the settlement between plaintiffs & defendant, described in said complaint, and that he supposed it was the basis on which the settlement was made.

Witness True also stated on cross-examination that the 15,776 yds. of loose rock described in said Exhibit "C" was the total amount of rock and earth removed in the excavation of the ditch from the head to station 43, and that the amount of excavation above station 43 would have been less by from ⅓ to ½ if the ditch had been constructed of the size and dimensions described in the written contracts annexed to plaintiffs' complaint, and to ex-
45 plain and illustrate the difference he drew a diagram, which was received in evidence and marked Exhibit "E."

*Testimony of W. C. Bradbury.*

W. C. BRADBURY was then called and sworn as witness for plaintiffs; he testified as follows:

I am one of the plaintiffs in this action. I signed the contracts marked Exhibits "A" & "B," attached to our complaint; that the original contract was signed before the commencement of the work on the ditch described in complaint, and the supplementary contract was signed a short time after the commencement of work on the ditch; that plaintiffs constructed the ditch for defendant.

Counsel for plaintiffs here asked the witness the following questions:

What changes were made in the written contract relating to the dimensions of the ditch? Which question was objected to on the part of the defendant on the ground that the same was irrelevant & immaterial, and that no such changes, if any such were made, could be proven under the issues made by the pleadings; which objections were overruled by the court; to which ruling defendant then and there excepted.

46 Witness then testified, in answer to the question, that the dimensions were enlarged to a width of 10 feet at the bottom and to the depth of 3 feet, by authority of Mr Case, and that plaintiffs constructed the ditch under the direction of Mr. True, who was the engineer of defendant superintending the construction. He further testified: I was present when the supplementary contract, Exhibit "B," was drawn by Mr. Caldwell. The original contract (Exhibit A) was lying on the table and was consulted and read; nothing was said by anybody about any verbal contract providing for the enlargement of the ditch.

The following is a copy of the letter of R. E. Strahorn, offered by plaintiffs and received in evidence by the court, referred to in the oral instructions of the court to the jury hereinafter contained:

HAILEY, IDAHO, *June*, 27, 1883.

Messrs. Bradbury & Reinhart, Boise City, Idaho.

GENTS: At the request of some of the parties interested in the "Hailey ditch," we had a U. P. engineer to come here and measure the excavations made by you on the ditch. He has not
47 completed the measurements yet, but his estimates furnished thus far show a difference between his and those of Mr. True which will amount to over $1,500.00. Taking the work measured as a basis, we estimate there will be a difference of fully $2,500 between the U. P. eng.'s measurement and those upon which we had a settlement. After finding this difference we could not consistently pay your draft of $6,774.49, which we had accepted. However, we made a tender of $4,274.49, being the full amount less the difference between the measurements already made and those which will be probably found after the measurements are completed. The bank has refused to accept the amount tendered, and the draft therefore went to protest. The $4,274.49 and interest on it for eighteen days will be paid to you on demand.

IDAHO & OREGON LAND IM'P'T CO.,
By ROB'T E. STRAHORN, *General Manager.*

48 *Plaintiffs' Amendments to Statement.*

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Ada.

W. C. BRADBURY and P. F. REINHART, Plaintiffs,
*against*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant.

Amendments to defendant's statement on motion for new trial.

Testimony on part of plaintiffs.

Insert the following after testimony of W. C. Bradbury:

*Testimony of E. B. True.*

E. B. TRUE, produced as a witness on the part of defendant, having been duly sworn, testified as follows:

Question. Have you made a computation of the difference in the cost and amount of dirt removed by the plaintiffs under the alleged verbal contract by Mr. Case and the original contract sued upon in this action, from section 43 to head of ditch, and is it different from your statement on Saturday?

Objected to by plaintiffs as incompetent and irrelevant and
49 inadmissible under the pleadings; objection overruled, and exception taken by plaintiffs.

Answer. The difference would be more that [than] ⅓ instead of ¼, as I before stated.

Question. How much more than ⅓ would it be?

Same objection by plaintiffs; overruled, & exception taken by pl'ffs.

Answer. It would be about as 95 to 51 or 52.

Defendant offers diagram made by witness. Objected to by plaintiffs on same ground as last question; objection overruled, and exception taken.

But very little work had been done on ditch when supplemental contract was made. They started at station 43 and worked up.

Question. Do you know what inducements were used for the purpose of procuring the supplemental contract by the parties?

Objected to by plaintiffs as calling for testimony which is incompetent, irrelevant, and inadmissible under the pleadings; objection overruled, and exception taken.

Answer. Bradbury stated that the original contract was indefinite as to the price to be paid for a considerable portion of the
50 ground, and that he could not afford to remove that class of ground for the price stated in the contract; that, as he under-

stood the contract, but very little of the ground above station 43 would come under the class stated in the contract, and that he wished the contract to be filled out and prices to be filled out, and prices to be fixed for all the different classes of work to be done. There was no rock above station 43 that required blasting. There was about ¼ of a mile of wet ground that required draining; it was from the bottom on the river to where the ditch strikes the bench.

Cross-examination:

At time supplemental contract was made the ditch had been staked out and surveyed from the head about 14,000 feet, near to the smelter, and it was upon that survey the ditch was built. That survey was made by me as engineer in charge appointed by defendant. Mr. Caldwell, Mr. Strahorn, Mr. Bradbury, and Mr. Wallace were present when supplemental contract was made. To the best of my recollection, nothing was said about the size of the ditch. The original contract, I think, was read at that time.

Re-examination-in-chief:

51 Mr. Bradbury claimed that a majority of the ground above station 43 was loose rock, as it was called in railroad work, and was not included in the class of ground for which a price was fixed in the original contract. Bradbury said he was satisfied he could not remove that class of excavation at the price and keep even. The words "earth excavation" only includes soil.

Recross-examination:

An embankment may be made of any material. As a matter of fact, in regard to this ditch, the term embankment meant nothing. The terms of the original contract applies only to earth or soil excavations; that is what it was put in there for.

*R. E. Strahorn.*

Insert in place of extracts from the testimony of R. E. Strahorn, a witness produced and sworn, an- who testified on behalf of defendant, on pages 7, 8, 9, & 10 of statement, the following:

R. E. STRAHORN, a witness produced and sworn on the part of the defendant, testified as follows:

I have been an officer of defendant ever since its organization—about three years; have seen the original contract. I was treasurer and a member of executive board. I was present when the
52 original contract was talked over and agreed to. Col. Case and Bradbury were present. Col. Case was then vice-president and general manager. Various sizes of ditch were talked of at the time. Mr. Bradbury and Col. Case had some talk about making the ditch 10 feet in width, to which I objected, and eight feet was agreed upon, as shown by original contract.

Question. What conversation, if any, was had between yourself and Mr. Case and Mr. Bradbury, at the time of making the contract, relating to the size of the ditch, and what limit as to size, if any, was stated there by you had been given to Mr. Case and yourself by the board of defendant's directors at the time of meeting of board, when authority was given and provision made for the construction of said ditch?

Objected to by plaintiffs as calling for testimony that is incompetent, irrelevant, and inadmissible under the pleadings; objection sustained and exception taken by defendant.

Question. Did you or did you not, at the time of making the contract, inform Mr. Bradbury that no authority had been given Mr. Case or yourself to construct a ditch of larger size than eight feet wide at the bottom and at a cost not to exceed $8,000, and a
53 contract for the construction of a ditch of any larger dimensions would not be ratified by the company?

Objected to by plaintiffs upon same grounds as last preceding question; objection sustained and exception taken.

Question. After signing of the original contract was anything said by Case, Bradbury, or yourself about changing dimensions of ditch?

Answer. No, sir; that was settled afterwards and before supplemental contract. I was here until nearly the first of May. After signing of the contract I had no conversation with Mr. Bradbury about the size of the ditch before I left for the annual meeting of the board. My place of business was at the office of Mr. Case, in Hailey. I was not made aware of the enlargement of the dimensions of the ditch by either Bradbury or Case. About May 1st I went to Denver; meeting of the board was had about 4th May. Up to the time of my leaving I had no notice that a change had been made in the original contract. There was action taken by the board in relation to the contract for ditch, but no changes author-
54 ized. I made a report to the board in relation to the ditch; it was made by myself and Mr. Case.

Question. Did you and Mr. Case, as members of the executive committee of defendant corporation, who had been empowered to make a contract for the construction of this ditch, make a report to the annual meeting of the board of directors of defendant; and, if so, did that report make any allusion to any amendment that had been made to the original contract subsequent to its execution?

Objected to by plaintiffs as being incompetent, irrelevant, and inadmissible under the pleadings; objection overruled and exception taken by plaintiffs.

Answer. The report simply embodied the fact that we had made that contract, and a copy of the original contract was filed with the report; Caldwell was president. He was re-elected at that time. I was elected vice-president and general manager at that meeting and have acted as such since; that was at the meeting about May 4th.

No power was given us by the board to enlarge dimensions of the ditch.

55 The president and myself reached Hailey about the middle of May. The making of the supplemental contract was a day or two after we arrived. Caldwell, Bradbury, and myself were present; Wallace part of the time At the time the supplemental contract was made no information had been conveyed to Caldwell or myself that the dimensions of the ditch had been enlarged; there was no mention made by Mr. Bradbury at that time that the ditch had been enlarged. I had no knowledge from any source that such enlargement was contemplated. I had no knowledge that the ditch had been surveyed larger than eight feet. The object of the supplemental contract was to classify the work, Bradbury claiming that he could not do the work at the price provided in the original contract. Bradbury claimed that he was getting into rock. It was about two weeks after supplemental contract that the ditch was completed and that I had settlement with Mr. Bradbury. We received the measurements of Mr. True; they were talked over, and there was some difference of opinion about classification of work,

56 which we afterwards settled after the details had been arranged. I paid Bradbury $5,000 cash, gave him draft for $5,000 at four or five days, and fifteen days' draft for the balance, something over $6,000; at the time I made the settlement I did not know of the enlargement of the ditch. I was only informed by Mr. True of the number of yards; the size of the ditch was not stated.

Question. Would you have made the settlement had you known of the enlargement of the ditch?

Objected to by plaintiffs as incompetent and irrelevant; objection overruled & exception taken by plaintiffs.

Answer. I certainly would not have made any such settlement had I known it.

Mr. Bradbury, Mr. True, Mr. Oldham, and myself went over the ditch. There was a question about classification of work prior to settlement, but we made no measurements. We drove up in a wagon and were gone a couple of hours. We made no examination except as to the earth-work and gravel work. I had no experience in construction of ditches then. I made my settlement with

57 Bradbury on the basis of the original contract, I suppose. I first ascertained that the ditch had been enlarged upon the remeasurement of it some two weeks later. Mr. C. N. Sawyer made the remeasurement, then a U. P. engineer. The reason I had the ditch remeasured was that the price struck me as rather high, and other owners in the ditch said it was too much. They insisted that there was too little ditch for the money, and that it was impossible that much earth could be taken out of an eight-foot ditch. After talks with them on the subject, I concluded to have it remeasured. I did not pay the last acceptance because the survey at that time did not show as much excavation as was called for by Mr. True's figures. The measurement had only reached station 43 when

acceptance became due. I don't recollect when I first learned that the ditch had been enlarged. It was about a week after. There was a difference between his report and that of Mr. True's. I made an offer of what I thought was due. When the acceptance was due I made the offer, because it was very important to have an immediate settlement. Then other parties were interested in securing
58 titles to land, and we had arranged to furnish still other parties with water to make proof on desert lands and to procure a title. Just then we thought best to make the offer. Exchange was in the bank of T. R. Jones, at Hailey. Sawyer at the time gave me an estimate of the difference between his measurements and True's. I offered about $4,200 to Mr. Burkett. It was based upon the difference of statements between the two engineers, True and Sawyer. The acceptance called for $6,700 and some odd dollars, and I offered the sum, less the difference shown by Sawyer's measurements. I don't know exactly the day when I first learned of the enlargement of the ditch. I have been acting as vice-president and manager of the corporation. I have been a member of the board of directors since that time and have attended all its meetings.

Question. Have the board ever ratified the enlargement of the ditch?

Objected to by plaintiffs as irrelevant, incompetent, and inadmissible under the pleadings; objection overruled and exception taken by plaintiffs.

Answer. They have not. The clerical part of the settle-
59 ment took but a few hours, but the trip up the ditch may have made it all day. There was no question arose except as to the classification. I think True said it would cost a couple hundred dollars to fix up the ditch.

Cross-examination:

I commenced to act as the general manager of defendant early in May, 1883. I was having my office at Hailey. I was out of Hailey most of the time. I had plenty of opportunities after I was elected vice-president and general manager of the defendant corporation and before I made the settlement with Bradbury to ascertain the dimensions of the ditch. Neither the plaintiffs nor any one else did anything or said anything to interfere with or prevent my ascertaining the dimensions of the ditch. I have never said anything to Mr. Bradbury in regard to the dimensions of the ditch. I accepted the ditch from Bradbury for the company at the time of our settlement, and the company have used the ditch ever since.

Testimony in rebuttal by plaintiffs.

*E. B. True.*

E. B. TRUE recalled:

60 I went with Strahorn, Oldham, and Bradbury to the head of the ditch on the day or the day before Bradbury and Stra-

horn had settlement. We walked in the ditch part of the way. On the way up or coming down, I do not remember exactly which, Oldham made the remark, "This ditch is not ten feet wide at this point, I know, for I can jump across it, and I can't jump ten feet." I took a tape-line from my pocket and Oldham held one end while I measured the width of the ditch, which was a few inches short of ten feet in width.

Cross-examined:

I am quite sure it was Oldham who helped me measure the width of the ditch.

Correct first line in statement so as to read: "This is an action upon a bill of exchange," &c.

The foregoing amendments to the plaintiffs' statement upon motion for new trial are respectfully proposed and submitted.

HUSTON & GRAY,
*Att'ys for Pl'ffs.*

To Messrs. F. E. Ensign & J. H. Crichton, att'ys for def't.

61 (Endorsed:) District court, Alturas county, I. T. Bradbury *et al. vs.* Idaho & Oregon L. I. Co. Amendments to statement on motion for new trial. Huston & Gray, att'ys for pl'ffs. Service of the within admitted this 14th day of August, 1885. F. E. Ensign, def'ts' att'y.

62 *Copy of Notice, Mechanics' Lien, &c.*

Copy of notice of mechanics' lien sought to be foreclosed in this action by plaintiffs and admitted in evidence by the court.

IDAHO TERRITORY, } *ss:*
*County of Alturas,* }

BRADBURY & REINHART
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY.

Notice is hereby given that Bradbury & Reinhart, of Alturas county, Idaho Territory, as the original contractors, performed labor upon and in the construction of that certain ditch near the town of Hailey, in the county of Alturas and Territory of Idaho, known as the "Hailey ditch," and sought to be charged with this lien, and described as follows: Commencing at a point near Wood river about four miles above the town of Hailey, at the foot of the first bench, and extending upon and along said bench to a point about 2 miles below the town of Hailey, in said Alturas county; that said Idaho & Oregon Land Improvement Company is the owner of said
63 ditch and caused the same to be constructed.

That said Bradbury & Reinhart is the name of the con-

tractors who, on the 13th day of April, 1883, as such contractors, entered into a contract in writing with the said Idaho & Oregon Land Improvement Company, under and by which and the supplement thereto, made and executed by the parties aforesaid on the 17th day of May, 1883, said labor was performed and said ditch constructed, and the following is a statement of the terms, time given, and conditions of said contract, to wit: Said ditch was to be constructed under the direction and charge of an engineer, to be appointed by said Idaho & Oregon Land Improvement Company, to be not less than four miles long and of the following dimensions, to wit: Eight (8) feet wide at the bottom, two (2) feet at its shallowest point, with a grade of three (3) feet per mile, and to be so constructed that each of its sides shall slope outward and upward at the rate of one (1) foot for each foot in depth, said contractors to commence work on said ditch as soon as practicable, and to complete
64 the same on or before the first day of July, 1883, at the agreed price of 32½ cents per cubic yard for all material moved in the construction of said ditch and all excavations from the head of said ditch to station 43, to be paid by said Idaho & Oregon Land Improvement Company at the rate of seventy (70) cents per cubic yard, and all work requiring blasting to be paid for at $1.60 per cubic yard, and for all clearing and grubbing the expense thereof and 10 per cent. added thereto to be paid to said contractors by said company, payments to be made upon estimates to be made at the end of each calendar month by the engineer in charge, and payment for each month to be made on or before the 10th of the following month, at the banking-house of T. R. Jones, at Hailey, in said county and Territory, less ten per cent. of the amount due, to be retained by said company until the completion of said ditch according to said contract and the approval by the engineer in charge.

That said contract has been fully performed on the part of the said Bradbury & Reinhart, and the same was completed and the said ditch finished on the 30th day of May, 1883, and sixty
65 days have not elapsed since the same was completed and said ditch finished.

That the amount of the contract price for said labor performed as aforesaid is seventeen thousand and eighty-one dollars and ninety cents ($17,081.90).

That ten thousand dollars has been paid on account of said contract price, and that the sum of six thousand seven hundred and seventy-four & $\frac{49}{100}$ dollars is still due and owing thereon to said Bradbury & Reinhart, after deducting all just credits and offsets.

Wherefore said Bradbury & Reinhart claim the benefit of the law relating to the enforcement of liens, to wit, chapter 48 of the Code of Civil Procedure of Idaho Territory.

BRADBURY & REINHART.

IDAHO TERRITORY, } ss:
*Alturas County,* }

William C. Bradbury, being duly sworn, deposes and says that he is a member of the firm of Bradbury & Reinhart and one of the per-

sons named as a contractor in the foregoing claim of lien; that he has read the same and knows the contents thereof, and that
66 the same is true, and that it contains (among other things) a correct statement of the demand of said contractors (Bradbury & Reinhart), after deducting all just credits and offsets.

W. C. BRADBURY.

Subscribed and sworn to before me this 12th day of July, 1883.

A. L. RICHARDSON, *Clerk*,
By E. E. RICHARDS, *Deputy*.

Copy of indorsement on back of said lien:

Notice of lien. Mechanics' lien. Bradbury & Reinhart *vs.* Idaho & Oregon Land Improvement Company. Contractors' lien on Hailey ditch. Filed for record, at request of W. C. Bradbury, July 12th, 1883, at 2 o'clock p. m., in Book 3 of Liens, at page 112. [Co. recorder's seal.] C. B. Fox, Co. recorder.

(See diagram marked p. 67.)

68 The following is a copy of Exhibit "C," referred to in the testimony of E. B. True, and which was offered by plaintiffs and received in evidence:

EXHIBIT "C."

The I. & O. Land Imp't Co., Dr., to Bradbury & Reinhart.

| | | | | | |
|---|---|---|---|---|---|
| To excavating | 15,776 | yds. | loose rock, @ 70c. | | $11,043 20 |
| " " | 17,596 | " | earth, " 32½ | | 5,718 70 |
| " " | 200 | " | blasting rock, 1.60 | | 320 00 |
| | | | | | $17,081 90 |

Hailey, I. T., June 1st, A. D. 1883.

I have personally examined the above and find the same correct.

E. B. TRUE,
*Engineer in Charge.*

69 *Instructions.*

Instructions of plaintiffs given to the jury in writing by the judge and excepted to by defendant.

If the jury find from the evidence that the ditch was constructed by the plaintiffs upon the survey made by the engineer in charge and by the direction of the general manager of def't and under his directions, and alteration- or change- in the dimensions of the ditch, varying from the dimensions stated in the contract of the same, were made by or under the directions of such engineer and were directed or assented to by the general manager of def't, — would

not be a breach of contract by plaintiffs nor would the defendant be entitled to any rebate or recoupment by reason thereof; and if after such completion the ditch was accepted by said defendant and a settlement was had between the plaintiffs and defendant, then the contract became an executed contract and the defendant is not entitled to any reduction, rebate, or recoupment by reason of any such changes or variations, and the plaintiffs are entitled to a virdict for
the amount of the acceptance of defendant given on such
70 settlement, to wit, $6,774.49, together with 20 per cent. damages on such sum, and interest at the rate of one per cent. upon the whole sum from the date of the protest of such acceptance, to wit, June 27, 1883.

2nd.

If the jury find from the evidence that the alteration in the size of the ditch was authorized as directed by the general manager of defendant corporation, and that the plaintiffs were advised of such alterations by or through the engineer in charge, or otherwise, and proceeded to construct the ditch upon such altered plan or dimensions, and the ditch as so constructed was afterwards accepted by defendant through its managing director, then the plaintiffs are entitled to recover the amount claimed by them, and the jury should so find.

3rd.

If the jury believe from the evidence that no false or fraudulent — were ever made by plaintiffs, and that defendant, through its officers, had full opportunity to examine the dimensions and constructions of the ditch and did examine same, and with such
71 opportunities and examination made the settlement alleged in the complaint, then the defendant cannot go back of such settlement but is bound thereby.

4th.

The jury are instructed that if they believe that the change in the dimensions of the ditch was authorized or directed by Mr. Case, the general manager of the defendant corporation, then it was not necessary that such action by Mr. Case, as such general manager of the defendant corporation, should be ratified by the board of directors if the defendant corporation afterwards accepted the ditch and appropriated it to their own use.

*Instructions Given Orally by the Court to the Jury and Excepted to by Defendant.*

If the jury find that Mr. Case was general manager of the defendant corporation at the time the change was made in the written contract, and the said changes were authorized by him, and that the work was done in accordance with instructions given by him, and that afterwards a settlement was made and the ditch was accepted

and used by defendant, you should find as amount due the
72 sum stated in the acceptance, together with protest damages and interest from date of protest.

If, however, you do not find those (above) facts you are instructed that you cannot avoid finding for the plaintiff and returning a verdict for the amount tendered, as appears from the letter introduced in evidence from Strahorn to plaintiffs, I think something over $4,200, together with 20 per cent. damages thereon for protest and interest. The 20 per cent. penalty for allowing the acceptance to go to protest may seem large and unjust, but it is the law of this Territory, and we cannot now question the wisdom of such law.

73 *Order Setting Aside General Verdict.*

MONDAY, *July 6th*, 1885.

W. C. BRADBURY *et al.*
*vs.*
IDAHO & OREGON LAND IMP'T CO.

Now came the plaintiffs, by their attorneys of record, and moved the court to set aside the general verdict herein, and to enter judgment in accordance with the special findings in said cause; which motion was opposed by defendant's counsel, and after argument the court took said motion under advisement.

TUESDAY, *July 7th*, 1885.

W. C. BRADBURY *et al.*
*vs.*
IDAHO & OREGON LAND IMP'T CO.

On this day the court announced its decision on the plaintiffs' motion to set aside the general verdict of the jury herein and to enter judgment in accordance with the special findings, heretofore argued and submitted. Ordered that said motion be, and is hereby, sustained, and that judgment and decree be entered herein in favor of plaintiffs and against defendant for the sum of $10,107.50,
74 together with costs of suit, to be taxed; and, on motion of def't's att'y, ordered that there be a stay of execution on the judgment in this cause for a period of twenty-five days from this date.

The above is a copy of the journal of the district court containing the order setting aside the general verdict of the jury rendered in the above-entitled cause.

75 *Specification of Errors.*

Specification of errors in which the evidence is insufficient to sustain the findings and decisions of the court.

1st.

The 2nd finding of the court purports to be based on the findings of the jury, and is wholly unsustained by any finding or special virdict of the jury.

2nd.

The 3rd finding of the court purports to be based on the finding of the jury, and is not supported or sustained by any finding or special virdict of the jury.

3rd.

The 5th finding of the court purports to be based on the findings of the jury, and is not supported or sustained by any finding or special virdict of the jury.

4th.

That the 6th finding of the court purports to be based on the findings of the jury, and is not supported or sustained by any finding or special virdict of the jury.

*Errors of Law.*

I.

The court erred in overruling the objection of the defendant to the following question asked Witness E. B. True by plaintiff:
76 "State what you know about the construction of the ditch described in the complaint, and whether any changes were made in the size or dimensions of the ditch from that described in Exhibits 'A' & 'B,' attached to said complaint; and, if any changes were made, state by whose directions they were made;" because it was irrelevant and immaterial, and was not responsive to any issue in the cause, and there was no allegation in the pleadings of any changes in the dimensions or size of the ditch described in said exhibit-.

II.

The court erred in admitting the evidence, against the objections of the defendant, of the enlargement of the ditch by consent of Mr. Case, obtained when he was general manager of defendant, for the following reasons:

1st. Because it was not within the issue raised by the pleadings, no contract for any such enlargement being stated therein.

2nd. Because such enlargement greatly increased the cost of the ditch, and presumedly of the amount of the virdict, and plaintiffs only claimed compensation in their complaint for the con-
77 struction of a ditch of the size & dimensions stated in the exhibits attached to said complaint.

3rd. Because there was no evidence that defendant consented to the contract enlarging the ditch, or that Mr. Case had any authority to make such a contract. On the contrary, the evidence of Mr. Strahorn clearly proves that defendant did not authorize it, and that Mr. Case had no authority from defendant to make it.

4th. Because, even if Mr. Case had authority to make such a contract, it was annulled by the subsequent supplementary contract contained in Exhibit "B," attached to plaintiffs' complaint.

III.

The court erred in overruling the objection of defendant to the following question asked W. C. Bradbury by plaintiffs:

"What change was made in the written contract relating to the dimensions of the ditch?"

1st. Because it was immaterial & irrelevant and was not applicable to any issue in the cause, and there was no allegation in the pleadings of any changes made in the written contract.

IV.

78 The court erred in admitting the evidence of witness Bradbury to prove an oral contract providing for the enlargement of the ditch, made with Mr. Case when he was general manager of defendant, against the objections of defendant, for the reasons which are stated fully in specifications of errors No. II.

V.

The court erred in refusing to permit R. E. Strahorn, vice-president and general manager of defendant, to answer the following questions:

"What conversation, if any, was had between yourself and Mr. Case & Mr. Bradbury, at the time of making the contract, relating to the size of the ditch, and what limits as to size, if any, was stated then by you had been given to Mr. Case & yourself by the board of defendant's directors at the time of the meeting of the board when the authority was given and provisions made for the construction of said ditch?"

Also,

"Did you or did you not, at the time of making the contract, inform Mr. Bradbury that no authority had been given Mr. Case
79 or yourself to construct a ditch of larger size than eight feet wide at the bottom and at a cost not to exceed $8,000, and a contract for the construction of a ditch of any larger dimensions would not be ratified by the company?"

—because the answer to said questions would have shown that

plaintiffs and said Mr. Case had full notice that the defendant would not consent to or ratify the construction of any ditch larger than the one described in the original contract.

VI.

The court erred in giving instruction No. 1, asked by plaintiffs, for several reasons:

1st. The first clause of said instruction assumes that the general manager of defendant had power, without the consent and against the orders of defendant, to construct a ditch of any size or cost, at the expense of defendant.

2nd. The said first clause assumes that the said "general manager's contract with plaintiffs would be binding on the defendant, even if plaintiffs knew at the time of the construction of said
80 ditch that plaintiffs never consented to and repudiated it.

3rd. The second and last clause of said instruction assumes that any acceptance of the ditch and settlement for the construction thereof by defendant, even though the same was procured by fraud or deceit or through mistake, would be binding on defendant.

VII.

The court erred in giving instruction No. 2, asked by plaintiffs, because said instruction assumes that if the construction of the ditch of a size larger than provided for in the written contract was authorized by the "general manager," of which defendant was advised by the engineer in charge, and the ditch after its construction was *ex*cepted by the "general manager," the defendants were bound, even if the "general manager," engineer in charge, and plaintiffs knew that defendant prohibited the building and acceptance of said ditch.

VIII.

The court erred in giving instruction No. 3, asked by plaintiffs, because it assumes that an examination by any of the officers of defendant bound the defendant corporation.

81 IX.

The court erred in giving instruction No. 4, asked by plaintiffs, because it assumes that a change in the size & and cost of the ditch made by authority of the general manager (even though the same — against the order of defendant), and the ditch was afterwards accepted by defendant (even though such acceptance was procured by fraud of plaintiffs) and used by them (even if both said Case and plaintiffs knew that defendants forbade any such change).

X.

The court erred in giving the oral instructions set out in this statement for the following reasons, to wit:

The reasons set out in specifications of errors in law No. VI, and for the following additional reason:

The court instructs the jury that they must, under any circumstances, find a verdict for plaintiffs for the amount tendered in the letter of Strahorn to plaintiffs and 20 per cent. added thereto for damages of protest, and interest thereon, whereas it is evident that, unless the jury found a verdict against defendant for a larger
82 sum than the amount tendered, the plaintiffs would not be entitled to damages for protest, for by such verdict the jury would find that defendant tendered to plaintiffs the whole amount due thereon.

XI.

The court erred in setting aside the general verdict of the jury on motion of plaintiffs and accepting the special verdict on findings of the jury for the following reasons:

1st. The general verdict was not in conflict or inconsistent with said special findings or verdict.

2nd. The special verdict or findings did not cover all the material issues in the cause.

XII.

The court erred in its conclusion of law No. 1 for the following reasons:

1st. Because it is in conflict with the general verdict of the jury.

2nd. Because it purports to be based on the finding of the jury and the findings of the court based on the findings of the jury, and neither the special findings or verdict of the jury or any findings based upon them authorized a judgment for any sum whatever.

XIII.

83 The court erred in its conclusion of law No. 2 for the following reasons:

1st. Because the evidence did not show that the lien was filed within 30 days required by law after the ditch was completed or the work of plaintiffs done upon said ditch finished.

2nd. The notice of lien shows that it was only intended to be a lien on a ditch constructed of the size, dimensions, and description set out in Exhibits "A" & "B," attached to plaintiffs' complaint, and the ditch actually constructed was a different ditch.

XIV.

The court erred in its decree of foreclosure and sale in finding that all the allegations in said plaintiffs' complaint are true, because the jury find in their first finding asked by defendant, which has been adopted by the court, that the ditch was not constructed as alleged in said complaint, and it necessarily follows that all the allegations of the complaint based upon the allegations therein that the ditch was constructed as alleged therein are necessarily untrue.

84 XV.

The court erred in its said decree in finding that there was due

from defendant to plaintiffs the sum of $10,107.52 for principal, damages, and interest, because said finding is in conflict with the virdict of the jury, and for many other reasons.

XVI.

The court erred in its said decree in adjudging a lien against said ditch for the whole amount of the judgment for reasons stated in specification XIII of errors of law, and for the further reason that said lien cannot lawfully cover the damages of protest.

XVII.

The court erred in making any findings of fact, because all the questions of fact were submitted to the jury and the jury only had cognizance of the facts proven on the trial.

F. E. ENSIGN AND
J. H. CRICHTON,
*Att'ys for Defendant.*

85 (Endorsed:) In the district court, 2nd judicial district, Alturas Co., Idaho. Bradbury & Reinhart, pl'ffs, *vs.* I. & O. Land Imp't Co. Statement of defendant on motion for a new trial. F. E. Ensign & J. H. Crichton, att'ys for def't. The within proposed statement examined and settled and signed as the statement of the case. Sept. 16, 1885. Case Broderick, district judge. Stay of execution ordered herein until the second day of next term. Sept. 16, 1885. Case Broderick, district judge. Filed Sept. 16, 1885. A. L. Richardson, clerk.

86 *Order Overruling Motion for New Trial.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

Present: Hon. Case Broderick, presiding judge.

October term, A. D. 1885. Saturday, October 17th, 1885.

W. C. BRADBURY *et al.*
*vs.*
I. & O. LAND IMPROVEMENT COMPANY.

On this day the defendant's motion for a new trial herein came on to be heard; and, after argument by counsel for the respective parties, the court, being fully advised in the premises, ordered that said motion for a new trial be, and the same is hereby, overruled (to which ruling the def'ts, by their counsel, then and there excepted in due form of law).

87 *Notice of Appeal.*

In the District Court of the Second Judicial District of the County of Alturas, Territory of Idaho.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.
} Notice of Appeal.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Idaho from the judgment and decree of foreclosure and sale therein entered in the said district court on the eighth day of July, 1885, in favor of the plaintiffs in said action and against said defendant, and from the whole thereof.

Dated this 26th day of October, 1885.

Yours, &c.,

F. E. ENSIGN & J. H. CRICHTON,
*Attorneys for Defendant.*

To the clerk of said district court and Messrs. Huston & Gray, attorneys for plaintiffs.

88 (Endorsed:) District court, second judicial district. W. C. Bradbury *et al.*, plaintiffs, *vs.* The Idaho & Oregon L. I. Co., defendant. Notice of appeal. Filed Oct. 26th, 1885. A. L. Richardson, clerk.

89 *Affidavit of Service of Notice of Appeal.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

W. C. BRADBURY & P. F. REINHART
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY.
} Affidavit of Service of Notice of Appeal.

TERRITORY OF IDAHO, *County of Alturas,* } *ss:*

E. E. Richards, of said Alturas county, being duly sworn, says that he is a white male citizen of the United States, over twenty-one years of age, and is competent to be a witness in said action, and was so competent on the 26th day of October, 1885; that on the said 26th day of October, 1885, the notice of appeal in the said cause was duly filed in said court, and that forthwith said affiant did make a certified copy of said notice of appeal hereto attached and depos-

ited it in the post office at Hailey, Idaho, enclosed in an envelope addressed to Messrs. Huston & Gray, att'ys-at-law, Boise City, Idaho, and paid the postage thereon in advance.

E. E. RICHARDS.

Subscribed and sworn to before me this 14th day of December, 1885.

[SEAL.] H. Z. BURKHART,
*Notary Public.*

90 *Undertaking on Appeal.*

In the District Court of the Second Judicial District of the County of Alturas, Territory of Idaho.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant.
} Undertaking for Costs and Damages on Appeal.

Whereas the defendant in the above-entitled action has appealed to the supreme court of the Territory of Idaho from a judgment and decree of foreclosure and sale rendered against said defendant in the said action in the said district court, in favor of the plaintiffs in said action, on the 8th day of July, 1885, for a sale of the property described in the complaint of plaintiffs filed herein to pay the amount found due in said action and costs:

Now, therefore, in consideration of the premises and of such appeal we, the undersigned, W. T. Riley and T. E. Picotte, of said county of Alturas, Territory of Idaho, do hereby jointly and severally undertake and promise on the part of the appellant that the
91 said appellant will pay all damages and costs which may be awarded against appellant on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 30th day of October, 1885.

W. T. RILEY. [SEAL.]
T. E. PICOTTE. [SEAL.]

TERRITORY OF IDAHO, } ss:
*County of Alturas,* }

W. T. Riley and T. E. Picotte, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and freeholder in the said Alturas county, and is worth the sum in said undertaking specified as the penalty thereof over and above his just debts and liabilities, exclusive of property exempt from execution.

W. T. RILEY.
T. E. PICOTTE.

Subscribed and sworn to before me this 30th day of October, 1885.

H. C. STREET,
*Probate Judge.*

92 (Endorsed:) District court, second judicial district, county of Alturas. W. C. Bradbury *et al.*, pl'ffs, *vs.* The Idaho & Oregon L. I. Co., def't. Undertaking on appeal. Filed Oct. 30, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy clerk.

93 *Undertaking against Waste.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

Whereas the defendant in the above-entitled case has appealed to the supreme court of Idaho Territory from a judgment and decree of foreclosure and sale rendered against said defendant in said action in said district court, in favor of the said plaintiffs in said action, on the 8th day of July, 1885;

And whereas the appellant is desirous of staying the execution of the said judgment & decree so appealed from, we do, in consideration thereof and of the premises, jointly and severally undertake and promise and acknowledge ourselves jointly and severally bound in the sum of three thousand dollars (being the amount for that purpose fixed by the judge of this court) that during the pos-
94 session of such property by the appellant it will not commit nor suffer to be committed any waste thereon, and that if the said decree appealed from be confirmed or the appeal dismissed the appellant will pay the amount of any damages from waste committed or suffered to be committed thereon during its possession thereof, not exceeding the sum of three thousand dollars so as aforesaid fixed by the judge of this court by which the said judgment & decree was rendered.

Dated Oct. 30, 1885.

ROB'T E. STRAHORN. [SEAL.]
J. S. WATERS. [SEAL.]

TERRITORY OF IDAHO, } *ss:*
*County of Alturas,* }

Robert E. Strahorn and J. S. Waters, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and householder in said Idaho Territory, and is worth three thousand dollars, the sum in

said undertaking mentioned, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. S. WATERS.
ROB'T E. STRAHORN.

Subscribed and sworn to before me this 30th day of Oct., 1885.

H. C. STREET,
*Probate Judge.*

95 (Endorsed:) In district court, 2nd judicial district, Alturas Co., Idaho. W. C. Bradbury *et al.*, pl'ff-, *vs.* The Idaho & Oregon Land Improvement Co., def't. Undertaking on appeal against waste. Filed Oct. 30, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy.

96 *Undertaking to Pay Deficiency.*

In the District Court of the Second Judicial District of Idaho Territory in and for Alturas County.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

Whereas the defendant in the above-entitled action has appealed to the supreme court of Idaho Territory from a judgment & decree of foreclosure and sale rendered against said defendant in said action in said district court, in favor of said plaintiff in said action, on the 8th day of July, 1885;

And whereas the appellant is desirous of staying the execution of the said judgment and decree so appealed from, we do, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves jointly and severally bound in the sum of two thousand dollars (being the amount for that purpose fixed by the judge of this court) to pay any deficiency
97 that may arise from the sale of the premises described in said decree under said decree, not exceeding the said sum of two thousand dollars so as aforesaid fixed by the judge of the court by which said judgment & decree was rendered.

Dated Oct. 30, 1885.

W. T. RILEY. [SEAL.]
T. E. PICOTTE. [SEAL.]
ROB'T E. STRAHORN. [SEAL.]

TERRITORY OF IDAHO, } ss:
*County of Alturas,* }

Rob't E. Strahorn, W. T. Riley, and T. E. Picotte, the sureties whose names are subscribed to the foregoing undertaking, being

severally duly sworn, each for himself says that he is a resident and householder in said Idaho Territory, and is worth two thousand dollars, the sum named in said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. T. RILEY.
T. E. PICOTTE.
ROB'T E. STRAHORN.

Subscribed and sworn to before me this 30th day of Oct., 1885.

H. C. STREET,
*Probate Judge.*

98 (Endorsed:) In district court, 2nd judicial district, Alturas, Co., Idaho. W. C. Bradbury *et al.*, pl'ff-, *vs.* The Idaho & Oregon Land Improvement Co., def't. Undertaking on appeal to pay deficiency. Filed Oct. 30, 1885. A. L. Richardson, clerk, by E. E. Richards, deputy.

99 *Clerk's Certificate to Transcript (Dist. Court).*

TERRITORY OF IDAHO, } ss:
*County of Alturas,* }

I, A. L. Richardson, clerk of the district court of the second judicial district of Idaho Territory in and for Alturas county, do hereby certify that the transcript of pages 1 to 113, inclusive, contains full, true, and correct copies of the original answer, affidavit, complaint, demurrer, decree, exhibits, errors of law, instructions, notices, orders, statement, and undertakings in case of W. C. Bradbury *et al. vs.* Idaho & Oregon Land Imp't Co., now remaining on file in my office in said county; and I do further certify that an undertaking on appeal in due form has been properly filed.

Witness my hand and the seal of said court, affixed this 14th day of December, 1885.

[SEAL.]

A. L. RICHARDSON, *Clerk,*
By E. E. RICHARDS, *Deputy.*

100 *Motion to Dismiss Appeal.*

In the Supreme Court of Idaho Territory. January Term, 1886.

W. C. BRADBURY *et al.*, Pl'ffs & Respondents,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Def't & Appellant.

The above-named respondents, by Huston & Gray, their attorneys, move this court to dismiss the appeal in the above-entitled action upon the ground that the transcript on file on appeal does not con-

tain the papers required by section 653 of the Code of Civil Procedure of Idaho Territory.

HUSTON & GRAY,
*Attorneys for Respondents.*

(Endorsed:) In the supreme court, Idaho Territory. January term, 1886. W. C. Bradbury *et al.*, pl'ffs & respondents, *vs.* Idaho & Oregon Land Imp't Co., def'ts & appellant. Motion to dismiss appeal. Filed Jan. 15th, 1886. A. L. Richardson, clerk.

101 *Suggestion of Diminution of Record, &c.*

In Supreme Court, Territory of Idaho.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs & Respondents,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant & Appellant.

Now comes the said appellant and suggests to the court that there is an error in the transcript filed in said cause from the court below in the following respect: The said transcript does not contain the virdicts of the jury or the findings of fact or conclusions of law of the court below; wherefore said appellant moves the court to grant an order that the clerk of the court below certify up to this court the said virdicts of the jury and the findings of fact and conclusions of law of the court below, so that said transcript shall contain a true copy of the judgment-roll in said cause.

F. E. ENSIGN,
*Att'y of said Appellant.*

102 (Endorsed:) In supreme court, Idaho Territory. W. C. Bradbury *et al.*, respondents, *vs.* The Idaho & Oregon Land Imp't Co., appellant. Suggestion of diminution of the record & motion to perfect transcript. Filed Jan. 16th, 1886. A. L. Richardson, clerk.

103 *Order on Suggestion of Diminution of Record, &c.*

Supreme Court, Idaho Territory.

SATURDAY, *January* 16, *A. D.* 1886.

W. C. BRADBURY *et al.*, Plaintiffs & Resp'd'ts,
*vs.*
IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant & Appellant. } Appeal from Alturas Co.

Now come the respondents, by their attorneys, Huston & Gray, and move the court to dismiss the appeal herein; which motion was opposed by F. E. Ensign, Esq., of counsel for appellant; and, after argument by the respective counsel, said motion was submitted and

taken under advisement by the court. Now comes F. E. Ensign, Esq., and on behalf of appellants suggests a diminution of the record herein, and moves the court that the clerk of the district court certify to this court a copy of the virdicts of the jury and findings of fact and conclusions of law of the court below to this court. Upon consideration whereof the court ordered that the clerk of the district court of the 2nd judicial district of Idaho in and for Alturas county certify forthwith up to this court the virdicts of the jury and the findings of fact and conclusions of law of the said court on the trial of said cause, so that the transcript of said cause may contain a true copy of the judgment-roll thereof.

104 *Objection to Supplemental Transcript.*

In the Supreme Court of Idaho Territory. January Term, 1886.

W. C. BRADBURY *et al.*, Pl'ff- & Respondent-,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT Co., Def't & Appellant.

Now come the said respondents, by their attorneys, Huston & Gray, and object to a hearing of the appeal herein upon any writ of errors assigned by appellant to the general and special virdict of the jury, and to the findings of fact and conclusions of law found by the court thereon, upon the following grounds:

1st. That there is no bill of exceptions in the transcript.

2nd. That said virdict and findings are not brought before this court by any statement, as required by the Code of Civil Procedure and by the rules and practice of this court.

HUSTON & GRAY,
*Att'ys for Respondents.*

105 (Endorsed:) Supreme court, Idaho Territory. Jan. term, 1886. W. C. Bradbury *et al.*, pl'ffs & resp'd-., *vs.* The Idaho & Oregon Land Imp't Co., def'ts & appel-. Objections to the supplemental transcript by respondents. Filed Feb. 3rd, 1886. A. L. Richardson, clerk. Huston & Gray, att'ys for res.

106 *Record Entries.*

Supreme Court, Idaho Territory. January Term, A. D. 1886.

FRIDAY, *February 19th*, 1886.

W. C. BRADBURY *et al.*, Plaintiffs & Respondents,
*vs.*
IDAHO & OREGON LAND IMPROVEMENT Co., Defendant & Appellant.
} Appeal from Alturas Co.

Now, on this day, this cause came regularly on to be heard—F. E. Ensign, Esqr., appearing as counsel for appellant and Messrs.

Huston & Gray for respondents. F. F. Ensign, Esqr., addressed the court on behalf of appellant, followed by Jo. W. Huston, Esqr., on behalf of respondents, after which the court adjourned the further hearing of said cause until to-morrow, the 20th inst., at 10 o'clock a. m.

SATURDAY, *February 20th, A. D.* 1886.

W. C. BRADBURY *et al.*, Plaintiffs & Respondents,
*vs.*
IDAHO & OREGON LAND IMP'T CO., Defendant & Appellant.

The argument of this cause, adjourned on yesterday for further hearing, was this day concluded by F. E. Ensign, Esqr., on
107 behalf of appellant, and said cause was submitted and taken under advisement by the court.

MONDAY, *March 8th, A. D.* 1886.

W. C. BRADBURY *et al.*, Plaintiffs & Respondents, *vs.* IDAHO & OREGON LAND IMPROVEMENT COMPANY, Defendant & Appellant. } On Appeal from the District Court of the Second Judicial District in and for Alturas County.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Justice Buck to the effect that the judgment of the court below be affirmed, and that the decree for foreclosure of mechanics' lien be modified so that the lien shall hold only for the judgment, less the protest damages.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the second judicial district in and for the county of Alturas in the
108 above-entitled cause be, and the same is hereby, affirmed and the decree of foreclosure of mechanics' lien is hereby modified so that the lien shall hold only for the judgment, less the protest damages.

109 *Opinion.*

Supreme Court, Idaho Territory. January Term, 1886.

W. C. BRADBURY & P. F. REINHART, Pl'ffs & Respondents,
*vs.*
IDAHO & OREGON LAND IMPROVEMENT CO., Def't & Appellant.

Appeal from Alturas Co., 2nd judicial district.

F. E. Ensign, att'y for appellant; Huston & Gray, att'ys for respondents.

Practice.—Where there is an inconsistency between the special findings and the general virdict of a jury, the special findings control the judgment.

The mechanics' lien law must be strictly construed, and cannot extend beyond the express provisions of the statute.

Exceptions to the ruling of the court upon the admission
110 and rejection of evidence may, when properly incorporated into a statement of the case, having been used upon the hearing of a motion for a new trial, be considered on an appeal from a judgment in the same manner as when brought up by a bill of exceptions.

Irrelevant evidence is not sufficient ground for the reversal of a judgment when it does not prejudice the cause of the party excepting to it.

Opinion by BUCK, *J:*

This action was brought to collect an acceptance for $6,774.49, payable fifteen days from date, which had been protested and was unpaid. The plaintiffs claim that said acceptance was given for a balance found due on settlement from defendants to plaintiffs for digging an irrigating ditch in Alturas county, Idaho Territory, and pray the foreclosure of a mechanics' lien upon said ditch. The complaint also alleges that said ditch was dug upon contract and sets out the contract therein.

The answer admits the contract and the settlement, but
111 alleges that without defendants' knowledge or authority the plaintiffs dug said ditch larger than the contract specified, and that the alleged settlement was made by them without knowing of said enlargement and was procured by plaintiffs by fraud, and deny that a larger sum than five hundred dollars was due thereon.

The case was tried by a jury and the following special questions were submitted to the jury and answered, to wit:

1st. Was the ditch constructed upon the survey made by the engineer in charge, employed by the defendant corporation?

Answer. Yes.

2nd. Did the dimensions of the ditch as laid out by the engineer

in charge vary from the dimensions as stated in the written contract?

Answer. Yes.

3rd. Were the changes and variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction?

Answer. Yes.

4th. Was there a settlement between the plaintiff- and defendant on the 9th day of June, 1883?

Answer. Yes.

112 5th. What amount was found to be due to plaintiffs from defendant upon such settlement?

Answer. $16,774.49.

6th. Did the defendant, by its gen'l manager, R. E. Strahorn, give its acceptance to plaintiffs for the sum of $6,774.49 upon such settlement?

Answer. Yes.

The jury found a general virdict that there was due plaintiff $4,274.49, and 20 per cent. and interest from date of acceptance.

The court found several findings of fact and the following conclusions of law:

*Conclusions of Law.*

1st. That the plaintiffs are entitled to a judgment for $10,107.52.

2nd. That plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint, and it is so ordered.

The appeal is taken from the order overruling a motion for a new trial and from the judgment, and is brought up on a statement of the case.

1st. That the first four findings of fact by the court are not sustained by any findings or special virdict of the jury.

113 2nd. That the court erred in making any finding of facts after the cause had once been submitted to a jury.

3rd. That the court erred in its first conclusion of law, in that it is in conflict with the general virdict of the jury, and because there is no finding of fact by the jury authorizing it.

4th. That the conclusions of law that the plaintiffs were entitled to a foreclosure of the mechanics' lien is not supported by the evidence, in that the evidence does not show that it was filed of record within 30 days after the work was done, and that the notice itself shows that it was only intended as a lien upon a ditch as originally contracted for.

5th. That the court erred in decreeing a foreclosure of the lien for the full amount, because the damages allowed for protest are not secured by the lien.

There are also other alleged errors, which will be considered hereafter.

The alleged error of rendering judgment for a different amount than specified in the general virdict seems not well taken. Section

385 of our Code provides that where special findings of fact are inconsistent with the general verdict the former control the latter, and the court must give virdict accordingly.

114 There is an inconsistency between the special findings of fact and the general virdict, but the judgment is in accordance with the special findings and is valid under said section of the Code.

The alleged error that the conclusion by the court that the plaintiff- was [were] entitled to the foreclosure of his [their] mechanics' lien was error seems not well taken, as the evidence shows the plaintiffs to have been original contractors and entitled to 60 days in which to file their lien.

The objection to the decree of foreclosure on the ground that the lien, if allowed, could not cover damages for protesting the acceptance seems well taken.

The lien exists only by force of the statute and cannot exceed the express provision thereof. Section 815 of our Code provides that the lien is for work, labor, or material done and furnished, and section 827 allows the lien to extend to moneys paid for filing and recording the same. It cannot be extended beyond these items.

1 Jones on Mortgages, § 360.
Phillips on Mechanics' Liens, § 204.

In the statement of the case are several exceptions to the
115 ruling of the court in the admission or rejection of evidence. It is maintained by respondents that such exceptions can only be brought upon a bill of exceptions. Section 413 of the Code, subdivision 3, provides that if a motion for a new trial is to be made upon a statement of the case the moving party must prepare the statement. When the notice of motion designates errors in law occurring at the trial as the ground relied on — the motion the particular errors relied on shall be specified therein. The Code seems to make no distinction between the errors to be brought up in a bill of exceptions and on a statement. It seems to leave it optional with the aggrieved party as to which method he will adopt. A statement of the case can only be made upon a motion for a new trial. Upon a simple appeal from the judgment no statement is authorized. A statement once made may be used on appeal from a judgment, under sec. 653 of the Code, and under the authorities it seems that a statement can be so used on an appeal from a judgment only when first used on a motion for a new trial.

Hayne on New Trials, § 254.

116 In other respects a statement and a bill of exceptions are similar.

People *v.* Crane, 60 Cal., 279.
People *v.* Lee, 14 Cal., 510.
Purdy *v.* Steele, 1 Idaho, 216.
People *v.* Hunt, 1 Idaho, 436.

We are of the opinion that exceptions to the ruling of the court in admitting or rejecting evidence may be considered on a state-

ment, where a statement is authorized, the same as in a bill of exceptions. Examining these alleged errors, we find that the rulings of the court sustaining objections to certain questions specified in the 5th assignment of error are in harmony with established rules of evidence. The first question is, "What conversation, if any, was had at the time of making the contract?" The written instrument itself contains the final result of their conversation, and what they said outside of it was immaterial. 2nd. "Did you inform plaintiff Bradbury that you had no authority to contract for a larger ditch than that specified, and that a different contract would not be ratified?"

The issues made by the pleadings were, Was the ditch dug and accepted? The preliminary conversation of parties would be
117 irrelevant to those issues, and were properly rejected. The evidence admitted under objections in assignments of error number- 1, 2, 3, & 4 went generally to the progress of the enterprise, and, while apparently not relevant to the chief issue of the acceptance of the ditch as completed by defendants, we cannot see that it in any way prejudiced defendants' case.

We think the instructions present the issues in the case fairly to the jury, and that no matter material to the appellant's cause was omitted.

Judgment affirmed as to judgment, and the decree for foreclosure of lien modified by striking from the am't the penalty for protest.

HAYS, *C. J.*, & BRODERICK, *J.*, concurring.

(Endorsed:) Filed March 8th, 1886. A. L. Richardson, clerk.

118 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of Idaho Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and decree of a plea which is in the said supreme court of Idaho Territory, before you, between The Idaho and Oregon Land Improvement Company, a corporation, and W. C. Bradbury and P. F. Rinehart, a manifest error hath hap-ened, to the great damage of the said Idaho and Oregon Land Improvement Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
119 United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error

what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Supreme Court, Idaho Territory.]

A. L. RICHARDSON,
*Clerk Supreme Court Idaho Territory.*

120 [Endorsed:] In supreme court, Idaho Territory. Idaho & Oregon Land Improvement Company, pl'ff in error, *vs.* W. C. Bradbury *et al.*, def't- in error. Writ of error. Filed May 6th, 1886. A. L. Richardson, clerk.

121 The United States of America to W. C. Bradbury and P. F. Rinehart, partners under the firm name of Bradbury and Rinehart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Idaho Territory, wherein The Idaho and Oregon Land Improvement Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice
122 of the Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

CASE BRODERICK,
*Associate Justice Supreme Court, Idaho Territory.*

123 OFFICE OF U. S. MASHAL, TERRITORY OF IDAHO.

I, Fred. T. Dubois, U. S. marshal for Idaho Territory, do hereby certify that I served the within citation by delivering a true and correct copy thereof personally to John S. Gray, one of the attorneys of record of W. C. Bradbury and P. F. Rinehart, the parties named in the within citation, at Boise City, Ada county, Idaho Territory, this seventh day of May, A. D. 1886.

FRED. T. DUBOIS,
*U. S. Marshal,*
By J. R. RICHARDS, *Deputy.*

124 [Endorsed:] In supreme court, Idaho Territory. Idaho & Oregon Land Improvement Co., pl'ff in error, *vs.* W. C. Bradbury *et al.*, defend't- in error. Citation. Filed May 7th, 1886. A. L. Richardson, clerk.

125 In the Supreme Court, Idaho Territory.

W. C. BRADBURY and P. F. RINEHART, Partners under the Firm Name of Bradbury & Rinehart, Plaintiffs,
*vs.*
THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

To the honorable the judges of supreme court, Idaho Territory:

The petition of the Idaho and Oregon Land Improvement Company, a corporation, respectfully shows—

That on the 8th day of March, A. D. 1886, in a certain suit pending in said supreme court, in which your petitioner was appellant and W. C. Bradbury and P. F. Rinehart, partners under the firm name of Bradbury & Rinehart, were respondents, the said cause being on appeal from the district court of the second judicial district of Idaho Territory in and for Alturas county, a judg-
126 ment and decree was entered against your petitioner in said cause at the January term of said supreme court, A. D. 1886.

Wherefore your petitioner prays the allowance of an appeal from said judgment and decree of said court to the Supreme Court of the United States, A. D. 1886.

Dated May 4th, A. D. 1886.

THE IDAHO AND OREGON — IMPROVEMENT COMPANY,
By its attorney, F. E. ENSIGN.

The appeal prayed in the foregoing petition is hereby allowed, with citation to issue on filing bond in the sum of fifteen thousand dollars, as approved May 6th, A. D. 1886.

CASE BRODERICK,
*Associate Justice Supreme Court, Idaho Territory.*

127 [Endorsed:] In supreme court, Idaho Territory. W. C. Bradbury *et al.*, pl'ff- & respondent-, *vs.* Idaho & Oregon Land Improvement Co., def't & appellant. Petition and allowance of appeal. Filed May 6th, 1886. A. L. Richardson, clerk.

128 The United States of America to W. C. Bradbury and P. F. Rinehart, partners under the firm name of Bradbury and Rinehart:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed and filed in the clerk's office of the supreme court of Idaho Territory, wherein The Idaho and Oregon Land Improvement Company is appellant and you are respondents, to show cause, if any there be, why the judgment and decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

CASE BRODERICK,
*Associate Justice Supreme Court, Idaho Territory.*

129 OFFICE OF U. S. MARSHAL, TERRITORY OF IDAHO.

I, Fred. T. Dubois, U. S. marshal for Idaho Territory, do hereby certify that I served the within citation by delivering a true and correct copy thereof personally to John S. Gray, one of the attorneys of record of W. C. Bradbury and P. F. Rinehart, the parties named in the within citation, at Boise City, Ada county, Idaho Territory, this seventh day of May, A. D. 1886.

FRED. T. DUBOIS,
*U. S. Marshal,*
By J. R. RICHARDS, *Deputy.*

130 [Endorsed:] In supreme court, Idaho Territory. W. C. Bradbury *et al.*, pl'ff- and respondent-, *vs.* Idaho & Oregon Land Improvement Co. Citation on appeal. Filed May 7th, 1886. A. L. Richardson, clerk.

131 *Exception to Sureties.*

In the Supreme Court of Idaho Territory.

W. C. BRADBURY and P. F. REINHART, Pl'ffs & Respondents,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, Def'ts & Appellants.

To the above-named defendants & appellants & to their attorneys, F. E. Ensign & J. Cregton, Esqrs.:

You will please take notice that the plaintiffs & respondents in the above-entitled action hereby excepts to the sufficiency of the sureties in the bond filed in the above-entitled case upon application for writ of error therein.

May 7, 1886.

Yours respectfully, HUSTON & GRAY,
*Att'ys for Plaintiffs & Respondents.*

132 (Endorsed:) Supreme court of Idaho Territory. W. C. Bradbury *et al.*, pl'ffs & respondents, *vs.* The Idaho & Oregon Land Improvement Co., def't & appellant. Notice of exception to sureties on bond for writ of error. Filed May 7th, 1886. A. L. Richardson, clerk. Copy served by mail May 7th, 1886. Huston & Gray, att'ys for pl'ffs & resp'd'ts.

133 *Order of Substitution of Bonds.*

In the Supreme Court of the Territory of Idaho. January Term, 1886.

W. C. BRADBURY & P. F. REINHART, Partners under the Firm Name of Bradbury & Reinhart, Plaintiffs,
*vs.*
THE IDAHO & OREGON LAND IMPROVEMENT COMPANY, a Corporation, Defendant.

Application having been made to said court by appellant that the bonds on appeal & writ of error of the above-entitled cause from the supreme court of the Territory of Idaho to the Supreme Court of the United States, filed in said court May 6th, 1886, signed & executed by J. S. Waters, W. T. Riley, J. R. Monell, A. J. McGowan, N. G. Brown, V. S. Anderson, & E. H. Hendrick, be withdrawn from the files of said court & cancelled, and that a bond on said appeal, signed & executed by Alexander Caldwell & Lucern Scott, of Leavenworth, Kansas, and a bond on said writ of error, signed & executed by said Alexander Caldwell and *on* C. B. Bruce, of Leavenworth, Kansas, be substituted therefor and filed and accepted as the bonds
134 on said appeal & writ of error to the said Supreme Court of the United States.

And the said appellee having in open court consented thereto—

It is ordered by the said court that the said bond signed & executed by the said Alexander Caldwell & Lucean Scott be filed and accepted as the bond on said appeal, and the said bond signed & executed by the said Alexander Caldwell & C. B. Bruce be filed & accepted as the bond on said writ of error, and that the bonds before filed therein be, and they are hereby, declared cancelled & annulled, and that said appellant have leave to withdraw them from the files of this court.

CASE BRODERICK,
*Associate Justice Supreme Court of Idaho Territory.*

(Endorsed:) Supreme court, Idaho Territory. W. C. Bradbury *et al.*, pl'ff's & resp'd'ts, *vs.* Idaho & Oregon Land Imp't Co., def'ts & appellants. Order of substitution of bonds. Filed June 19th, 1886. A. L. Richardson, clerk.

135 UNITED STATES OF AMERICA, *Territory of Idaho:*

I, A. L. Richardson, clerk of the supreme court of the Territory of Idaho, do hereby certify that the foregoing transcript contains a true copy of the record and proceedings in the case of W. C. Bradbury *et al.*, plaintiffs and respondents, *vs.* The Idaho and Oregon Land Improvement Company, defendant and appellant, lately decided in said court, and of the whole thereof, except the writ of error

and citation thereon and the petition and allowance of appeal and citation thereon, of which the originals are contained therein.

Witness my hand and the seal of said court, affixed this 25th day of June, A. D. 1886.

[Seal Supreme Court, Idaho Territory.]

____ ____,

*Clerk Supreme Court, Idaho Territory.*

Endorsed on cover: Idaho Territory supreme court. No. 379. The Idaho and Oregon Land Improvement Company, plaintiff in error and appellant, *vs.* W. C. Bradbury & P. F. Rinehart, partners under the firm name of Bradbury & Rinehart. Filed October 1, 1886.

Office Supreme Court U. S.
FILED.
NOV 12 1889
JAMES H. MCKENNEY.
CLERK.

# Supreme Court of the United States.

October Term, 1889.

*No. 105.*

## THE IDAHO AND OREGON LAND IMPROVEMENT CO.

PLAINTIFF IN ERROR,

*v.*

## W. C. BRADBURY and P. F. RINEHART,

DEFENDANTS IN ERROR.

# BRIEF FOR PLAINTIFF IN ERROR.

W. C. HOLCOMB,
J. H. McGOWAN,
*Attorneys for Plaintiff in Error.*

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

# Supreme Court of the United States.

OCTOBER TERM, 1889.

THE IDAHO AND OREGON LAND IMPROVEMENT CO.,
PLAINTIFF IN ERROR AND APPELLANT,
*v.*
W. C. BRADBURY AND P. F. RINEHART.

*No.* 105.

This is an action commenced in the district court of Alturas county, Idaho, to foreclose a lien on a water ditch which had been constructed by the defendants in error (the plaintiffs below) for the plaintiff in error.

The issue was joined on the complaint and answer. The pleadings are supposed to be in conformity with the code of procedure in vogue in the Territory. The complaint sets forth in substance that the defendants in error were partners, under the firm name of Bradbury & Rinehart; that April, 13, 1883, they contracted, in writing, with the plaintiff in error, a corporation, to construct the ditch in question; that on the 17th of May, 1883, and before the ditch was completed, the parties to the contract made a supplement thereto, in writing, both of which paper-writings are set out in full, and made part of the complaint.

The original contract (Rec., 4) provides, in substance, that the defendants in error shall construct for the plaintiff in error a certain ditch, to commence at a point near Wood river, about 4 miles above the town of Hailey, along a line to be designated by the engineer who should be chosen by the plaintiff in error, and be not less than four miles long, be eight feet wide at the bottom, two feet deep at its shallowest point, with a grade of three feet to the mile, the sides to slope upward and outward at the rate of one foot for each foot of depth. The general provision as to price being that the contractors should have "thirty-two and one-half ($32\frac{1}{2}$) cents per cubic yard for all material moved in the construction of said ditch." But it was further provided that in case it became necessary, under the directions of the engineer in charge, to move any of the material more than one hundred feet, the contractors were to have four cents per cubic yard extra for each hundred feet thus moved. Near the foot of the writing is found the following: "The foregoing provisions of this contract are not to apply to any material that will require blasting to remove, nor to low and boggy ground, nor ground which will require clearing or grubbing."

The writing termed a supplement to this contract (Rec., 5) is as follows:

"*Supplement.*

"It is agreed that the contract of Bradbury & Reinhart with the I. & O. L. Improvement Co., dated April 13, '83, shall be amended and modified as follows: All excavations from the head of the ditch to station No. 43, which it is agreed shall include all the work to be classified as low and boggy ground or as loose rock, to be paid for at 70c. per cubic yard, and all work requiring blasting is to be paid for at $1.60 per cubic yard; and for all the clearing & grubbing B. & R. shall keep a force [full] account of time, labor,

and expenses of same, which amount, together with ten per cent. (10%) added for profit, shall be paid to said B. & R. in full for such clearing & grubbing, and all the remainder of the work shall be settled for at 32½c. per cubic yard, as per contract."

The complaint further alleges "that on the first day of June, 1883, the plaintiffs having completed said ditch in accordance with the terms and conditions of said contract and the supplement or amendment thereto, and said ditch having been accepted by said defendant under the terms of said contract, the plaintiffs came to a settlement with defendant of and concerning the said contract and the work and labor done by plaintiffs thereunder and in fulfillment thereof;" and that upon such settlement there was found due the contractors $16,774.49, and that the defendant (below) delivered to the contractors a check on Jones' banking-house for $5,000, also one acceptance of $5,000, to be paid in four days, and another acceptance of $6,774.49, to be paid in fifteen days; that the bank check and first accepance were duly paid, but that the last acceptance of $6,774.49 was not paid and was protested. The complaint then sets forth that the contractors in order to secure the amount still due them duly filed a lien on said ditch or on the interest of the corporation therein, and the prayer is for judgment foreclosing the lien, sale of the premises, &c.

To this complaint the defendant (below) answers with a general denial of the material allegations, and then adds:

"And the said defendant, in further answer to said complaint, alleges that if a settlement with said defendant was ever made by plaintiffs of or concerning the alleged contract or the work or labor done thereunder or in fulfilment thereof, or if in any such settlement it was ascertained or agreed that there was due or unpaid upon said contract, for the work or labor done by plaintiffs thereunder, the sum of

$16,774.49, or if in payment of said sum the check and acceptances described in said complaint were made by defendant, the said settlement was made and the said check and acceptances were executed under a misapprehension of the facts caused by the false and fraudulent statements and misrepresentations of the plaintiffs that the said ditch was completed in accordance with the alleged contracts set out in the complaint, which said false and fraudulent statements and misrepresentations of plaintiffs were believed by defendant and caused defendant to make such settlement and execute said check and acceptances, and defendant would not have made such settlement or executed said check or acceptances had defendant then known the truth."

The case was tried with a jury, which rendered a verdict for the plaintiffs (below) for $4,274.49 (Rec., p. 9).

This is exactly the amount that was tendered the plaintiffs, by the general manager of the corporation, in settlement of their claim (see letter of Rob't E. Strahorn, Rec., 18).

On questions submitted the jury also made the following special findings :

"1st. Was the ditch constructed upon the survey made by the engineer in charge employed by the defendant corporation ? Yes.

"2d. Did the dimensions of the ditch as laid out by the engineer in charge vary from the dimensions as stated in the written contract ? Yes."

"3d. Were the variations or changes in the dimensions of the ditch as laid out by the engineer in charge from those stated in the contract made before the work of construction was commenced ? Cannot agree.

"4th. Were the changes or variations in the dimensions of the ditch made with the knowledge of Mr. Case, the vice-president and general manager of the defendant corporation, and by his direction ? Yes.

"5th. Was the ditch accepted by the defendant corpora-

tion, and have they appropriated and used it ever since such appropriation and acceptance? Cannot agree.

"6th. Was there a settlement between the plaintiffs and defendant on the 9th day of June, 1883? Yes.

"7th. What amount was found to be due to plaintiffs from defendant upon such settlement? $16,774.49.

"8th. Did the defendant, by its general manager, R. E. Strahorn, give its acceptance to plaintiffs for the sum of $6,774.49 upon such settlement? Yes." (Rec., 8 & 9).

During the progress of the trial objections were made on the part of the defendant corporation to any evidence tending to prove another contract other than the one set out in the complaint. The court overruled these and admitted proofs tending to show that the written contract had been so varied by an oral understanding between the contractors and the general manager of the defendant corporation that the dimensions of the ditch were enlarged in the proportion of 51 or 52 to 95, or in other words, that the oral contract varied the written one to the extent of nearly doubling the amount of earth excavated, and which was to be paid for at the rate of 32½ cents per cubic yard (Rec., 16, 17, 18, & 19).

The court also refused to admit testimony tending to show that the general manager had no authority from the corporation to make such contract or modification of the existing contract (Rec., 21, 22). To all these several rulings of the court exceptions were duly taken.

On the motion of the plaintiffs (below) the verdict of the jury for $4,274.49, was set aside and a judgment entered by the court for the sum of $10,107.50 (Rec., 28), and a sale of the premises ordered.

The findings of fact and conclusions of law by the judge will be found on pp. 10 and 11 of the record. The decree of foreclosure and sale is found on p. 11 *et seq.*

The corporation defendant made a motion for a new trial on the grounds—

"1st. Accident and surprise which ordinary prudence could not have guarded against.

"2d. Insufficiency of the evidence to justify the verdict and other decisions, and that the verdict is against law.

"3d. Errors in law occurring at the trial and excepted to by the defendant." (Rec., 13, 14.)

This motion was supported by an affidavit made by the general manager of the corporation which the court evidently received and considered. (Rec., 14, 15.) The motion for a new trial was overruled (Rec., 33), and thereupon plaintiffs in error appealed to the Supreme Court of the Territory (Rec., 34 *et seq.*), filing a series of specifications of error, both of fact and law. (Rec., 29 to 33.)

The Supreme Court rendered a judgment and decree affirming the decree of the District Court, making a trifling deduction from the amount (Rec., 41); thereupon the case was appealed here.

## Points and Argument.

1st. The plaintiffs (below) having declared upon the written contract, and placed the same in evidence, could not be allowed to vary it by proofs showing another contract. The Court erred in admitting such proofs.

2d. It was error not to allow the corporation to show that Case had no authority to make a new contract or vary the one already made.

3d. There was no such inconsistency between the special findings and verdict of the jury as authorized the Court to set aside the latter.

4th. The record discloses fraud on the part of the contractors, and fully justified the reduced amount found by the jury in their verdict.

These are the principal points we shall urge in the argument, at the same time asking the attention of the Court to the additional points made by counsel on appeal to the Supreme Court of the Territory, and now part of the record, found on pages 29 to 33.

## I.

The contract was reduced to writing, is set out in full in the complaint or declaration, which alleges that the ditch was completed in accordance with its terms and conditions. There is no allegation in the complaint of the existence of any other contract between the parties, or of any change or modification of the one declared upon. The complaint was made to enforce a lien upon the ditch. The lien was created, if at all, by filing a notice of the same with the county recorder. That notice (Rec., 24, 25) contains the substance of the written contract. This notice of lien is also made a part of the complaint (Rec., 3). Thus the written contract is explicitly set out once, and practically set out the second time, in the complaint.

The defendant corporation traversed the complaint by denying that the ditch was constructed in accordance with the terms and conditions of the contract declared upon. The issue was clearly made on that point.

Now, during the progress of the trial, the following occurred (Rec., 16, 17):

"E. B. True was called and sworn as a witness for plaintiffs, and plaintiffs' attorney asked him the following questions:

"State what you know about the construction of the ditch described in the complaint, and whether any changes were made in the size or dimensions of the ditch from that described in Exhibits 'A' and 'B,' attached to said complaint; and, if any changes were made, state by whose direction they were made?

"Defendant objected to the question on the ground that the same was irrelevant and immaterial, and that no changes in the contract set out in said exhibits relating to the size or dimensions of the ditch to be constructed and no new contracts authorizing the construction of a ditch of different dimensions from that stated in said exhibits could be proven under the issues made by the pleadings.

"The Court overruled the objection of defendant and admitted the testimony; to which ruling of the Court the defendant duly excepted.

"In answer to said question the witness testified as follows:

"I had considerable conversation with Mr. Case, who I understood was managing the business of the defendant at Hailey, about the ditch. I discussed with him the size and dimensions of the ditch before the contract was made with Bradbury & Reinhart, and what its size should be as it was extended down the valley towards the town of Hailey. Afterwards I read the written contract (Exhibit "B"), and when I came to the point where it stated the dimensions of the ditch I stated to Mr. Case that I did not understand that it was to be of that size. I said to him, 'You told me it was to be 10 feet wide at the bottom.' He said in reply, 'Never mind those figures, but go on and stake out a ditch as we had before determined upon.' He remarked that there were several matters in the contract which were to be left for future consideration, and I understood that this was to be one. I had several other conversations with him about the ditch, and then went and staked out the ditch to be 10 feet wide at the bottom at the upper end, but diminished it to 7 feet wide at the bottom near the town of Hailey. I don't know whether the contract was signed at the time I saw it. I think it was not.

"All of the above testimony of witness True was admitted

by the Court against the objection of defendant; to which ruling of the Court the defendant duly excepted. The witness True also testified that the ditch was dug 2 feet wider at the bottom and 1 foot deeper than was provided for in the written contracts set up in the complaint for a large portion of the way from its head to the town of Hailey and that the ditch headed about four miles above the town of Hailey.

"W. C. Bradbury was then called and sworn as witness for plaintiffs; he testified as follows:

"I am one of the plaintiffs in this action. I signed the contracts marked Exhibits 'A' & 'B,' attached to our complaint; that the original contract was signed before the commencement of the work on the ditch described in complaint, and the supplementary contract was signed a short time after the commencement of work on the ditch; that plaintiffs constructed the ditch for defendant.

"Counsel for plaintiffs here asked the witness the following questions:

"What changes were made in the written contract relating to the dimensions of the ditch? Which question was objected to on the part of the defendant on the ground that the same was irrelevant & immaterial, and that no such changes, if any such were made, could be proven under the issues made by the pleadings; which objections were overruled by the court; to which ruling defendant then and there excepted.

"Witness then testified, in answer to the question, that the dimensions were enlarged to a width of 10 feet at the bottom, and to the depth of 3 feet, by authority of Mr. Case, and that plaintiffs constructed the ditch under the direction of Mr. True, who was the engineer of the defendant superintending the construction."

In admitting testimony of this character the Court was clearly in error.

II.

The Court having admitted proofs of another contract than the one set out in the declaration, and the testimony

showing that whatever authority the contractors had for enlarging the dimensions of the ditch they got from the general manager, Case, the defendants attempted to show that Case had no such authority from the corporation, whose agent he was. The Court denied them this right. In fact, the proposition was not only to show that Case had no such authority, but to bring that fact home to the contractors. But the Court ruled it all out.

On this point the record shows (Rec., 20, 21) as follows:

"R. E. Strahorn, a witness produced and sworn on the part of the defendant, testified as follows:

"I have been an officer of defendant ever since its organization—about three years; have seen the original contract. I was treasurer and a member of executive board. I was present when the original contract was talked over and agreed to. Col. Case and Bradbury were present. Col. Case was then vice-president and general manager. Various sizes of ditch were talked of at the time. Mr. Bradbury and Col. Case had some talk about making the ditch 10 feet in width, to which I objected, and eight feet was agreed upon, as shown by original contract.

"Question. What conversation, if any, was had between youself and Mr. Case and Mr. Bradbury, at the time of making the contract, relating to the size of the ditch, and what limit as to size, if any, was stated there by you had been given to Mr. Case and yourself by the board of defendant's directors at the time of meeting of board, when authority was given and provision made for the construction of said ditch?

"Objected to by plaintiffs as calling for testimony that is incompetent, irrelevant, and inadmissible under the pleadings; objection sustained and exception taken by defendant.

"Question. Did you or did you not, at the time of making the contract, inform Mr. Bradbury that no authority had been given Mr. Case or yourself to construct a ditch of larger size than eight feet wide at the bottom and at a cost not to exceed $8,000, and a contract for the construction of

a ditch of any larger dimensions would not be ratified by the company?

"Objected to by plaintiffs upon same grounds as last preceding question; objection sustained and exception taken."

Agents of corporations as well as agents of natural persons must act within the scope of their authority. Whether or not an agent is acting within his authority is a fact that may always be shown where the principal is sought to be held responsible.

In this case the parties dealing with the agent were sufficiently notified of the limitations under which Mr. Case was acting by the written contract which they had made with the principal. It will not do to say that the corporation ratified the acts of its agent by accepting the ditch or making the alleged settlement. Whatever settlement and acceptance were made were made with the understanding that the ditch had been constructed according to the written contract, and wholly without knowledge on the part of the corporation that it had been nearly doubled in size. Strahorn, who, as general manager, made the alleged settlement, testifies that he was present when the original contract was made; that there was some talk of a ditch ten feet wide at the bottom, but he objected to it, and the contract was agreed to, fixing the width at eight feet; that this contract was reported to the board of directors, and that they did not authorize any enlargement of the dimensions of the ditch. The contract was made on the 13th of April, and was reported to the board of directors at Denver on the 4th of May following. At this latter date Mr. Case, whom it is claimed authorized the enlargement of the ditch, was displaced from his office as general manager, and Mr. Strahorn appointed in his stead. Mr. Strahorn and the president, Mr. Caldwell, then went to Hailey, where they at once made the supplemental written contract. This was about the middle of May, and

up to this date the proposed ditch had only been partly surveyed and apparently no excavation as yet made (see True's testimony, page 20 of the record).

From this time forward until the completion of the ditch and the trial of the case Mr. Strahorn was the general manager and the only officer of the corporation, so far as appears, who resided at Hailey. He swears positively that at the time he paid Bradbury the $5,000 and gave him the two acceptances he had no knowledge from any source that the ditch had been enlarged. His testimony is strongly corroborated on this point, and there is nothing contradicting it.

If the ditch was accepted and the settlement made with the understanding on the part of the corporation that it was constructed in accordance with the provisions of the written contract, how can the Court hold that such an acceptance was a confirmation and adoption of the acts of Case directing a ditch of double the size?

The want of authority on the part of Case, and the fact that Bradbury & Rinehart knew he had no such authority as he attempted to exercise, should have been laid before the jury, and to exclude it was error on the part of the Court.

## III.

The special findings and general verdict of the jury were not so inconsistent as to warrant the Court in setting the latter aside.

The Court instructed the jury, among other things, as follows (Rec. 27, 28):

"*Instructions given orally by the Court to the jury and excepted to by defendant.*

"If the jury find that Mr. Case was general manager of the defendant corporation at the time the change was made

in the written contract, and the said changes were authorized by him, and that the work was done in accordance with instructions given by him, and that afterwards a settlement was made and the ditch was accepted and used by defendant, you should find as amount due the sum stated in the acceptance, together with protest damages and interest from date of protest.

"If, however, you do not find those (above) facts you are instructed that you cannot avoid finding for the plaintiff and returning a verdict for the amount tendered, as appears from the letter introduced in evidence from Strahorn to plaintiffs, I think something over $4,200, together with 20 per cent. damages thereon for protest and interest. The 20 per cent. penalty for allowing the acceptance to go to protest may seem large and unjust, but it is the law of this Territory, and we cannot now question the wisdom of such law."

Now, among the things asked of the jury to specially find was whether the ditch was accepted by the defendant corporation, and whether it had appropriated and used it. This is the fifth question appearing on page 9 of the record, and it will be seen that the jury failed to agree. Not having found that the ditch was accepted the jury conformed to the instructions of the court and gave verdict for the exact amount which had been tendered by Strahorn, as they were directed to do.

What is there inconsistent between this verdict and the affirmative findings of the jury? Certainly the verdict would not be excluded by the 1st, 2d, or 4th findings. On the 3d and 5th questions the jury could not agree.

The 6th, 7th, and 8th are as follows:

"6th. Was there a settlement between the plaintiffs and defendant on the 9th day of June, 1883? Yes.

"7th. What amount was found to be due to plaintiffs from defendant upon such settlement? $16,774.49.

"8th. Did the defendant by its general manager, R. E.

Strahorn, give its acceptance to plaintiffs for the sum of $6,774.49 upon such settlement? Yes."

Taken by themselves there is nothing inconsistent between these findings and the fact that at the time of the suit the amount remaining due the plaintiffs was $4,274.49. If the inconsistency exists at all it is between the verdict and the 8th finding, wherein Strahorn was found to have given the plaintiffs an acceptance for $6,774.49.

But why should a verdict of $4,274.49 be any more inconsistent with the found fact than the judgment of the Court is inconsistent therewith, as that was for $10,107.52?

The verdict of the jury can only be made inconsistent by going outside the special findings and assuming that the acceptance mentioned in finding 8 had not been paid and there were no proper deductions to be made therefrom.

It must be conceded, and is conceded by the Supreme Court of the Territory, that the only warrant the district court would have to set aside the verdict of the jury would be the fact that it was inconsistent with the special findings. If this Court finds there is no inconsistency the case should be sent back. Juries are not apt to unduly protect corporations, and any verdict rendered in their favor should not be lightly set aside for a more onerous judgment.

## IV.

The record justifies the conclusion that there was fraud and collusion on the part of the contractors and Case, the first named general manager of the corporation.

To dig a ditch ten feet wide at the bottom and three feet deep would require the excavation of about double the amount of earth that would be taken from a ditch eight feet wide at the bottom and two feet deep. Therefore whatever

profit there would be in taking out the number of cubic yards in the construction of the smaller ditch would be doubled in constructing the other. Here is the incentive for the contractor to collude with the general manager. With the large ditch he will double his profits. Case, the manager, had talked with True, the engineer, about a ten-foot ditch before the contract was made (Rec., 16). True says he had considerable talk with Case, whom he understood was managing the business of the defendant corporation in Hailey. The residence of this corporation with its board of directors was at Denver, hundreds of miles from Hailey.

When Bradbury, on the part of the contractors, and Case, on the part of the corporation, came together to make the contract, they also talked of a ditch ten feet wide on the bottom. But another officer of the corporation, the treasurer, happened to be there. Mr. Strahorn says in his testimony (Rec., 20), "Mr. Bradbury and Col. Case had some talk about making the ditch ten feet in width, to which I objected, and eight was agreed upon, as shown by original contract."

But immediately after the contract was made Engineer True got a chance to read it and was evidently disappointed in the size of the ditch provided for. It was to be only 8 feet on the bottom and 2 feet deep. He then said to Case: "You told me it was to be 10 feet wide at the bottom." And Col. Case replied: "Never mind those figures, but go on and stake out a ditch as we had before determined upon" (Rec., 16). And this Mr. True thinks was before the contract was even signed (Rec., 17).

The written contract was made on the 13th of April, and Case immediately directed True to violate it by making the survey for the larger ditch. On the 1st of May Case went with Strahorn to Denver and joined in a report to the board

of directors, where he laid before them and put on file with them the written contract for a ditch that would cost about $8,000, and said not a word of the ditch which he had ordered, which was to cost the corporation upwards of $17,000. (Rec., 21.) Mr. Case was the only man at this meeting who knew that the expenses of the company were to be double the amount apparent on the face of the contract, and he kept silent. The board of directors at this meeting took action in relation to the written contract for the ditch, but authorized no changes. (Rec., 21, 22.) They were in utter ignorance of the fact that their general manager had already given instructions to double the size of the structure.

About the middle of May the president of the corporation, Mr. Caldwell, and the new vice-president and general manager, Mr. Strahorn, arrived in Hailey. On the 17th May the supplemental contract was drawn up and signed. (Rec., 5 and 6, and 22.) There were present at the time Mr. Bradbury, Mr. Caldwell, and Mr. Strahorn, also a man by the name of Wallace part of the time, as testified to by Strahorn. (Rec., 22.) Engineer True also testifies that he was present. (Rec., 20.)

Now let us have the testimony of what transpired on that occasion. Mr. Bradbury says: "I was present when the supplementary contract, Exhibit B, was drawn by Mr. Caldwell. The original contract (Exhibit A) was lying on the table and was consulted and read; *nothing was said by anybody about any verbal contract providing for the enlargement of the ditch*" (Rec. 18). Mr. True says: "To the best of my recollection, nothing was said about the size of the ditch. The original contract, I think, was read at that time" (Rec. 20). And Mr. Strahorn says: "At the time the supplemental contract was made no information had been conveyed to Caldwell or myself that the dimensions of the ditch had been enlarged; there was no mention made by

Mr. Bradbury at that time that the ditch had been enlarged. I had no knowledge from any source that such enlargement was contemplated. I had no knowledge that the ditch had been surveyed larger than eight feet." (Rec., 22).

Why was Mr. Bradbury silent at this time as to the great change he now claims had already been made in the original contract? This original was under discussion and was being amended by an additional writing. This was the time to have a mere oral agreement made certain by putting it in writing.

There is but one explanation of his conduct. He knew the enlargement of the ditch was unauthorized by the Company. He had conspired with the former general manager to beat the corporation, and he was keeping his secret.

His subsequent conduct in the premises corroborates this conclusion. Everywhere he put the paper writings forward as the contract. He evidently did not even divulge his arrangement with Col. Case to his attorneys until after the pleadings were in. He filed his notice of lien with the county recorder, describing a ditch eight feet wide on the bottom and two feet deep. He hoped to get through and get his pay on the estimates of Mr. True before his trick was discovered. But Strahorn employed another engineer to remeasure the ditch, and it was necessary to fall back on the arrangement claimed to have been made with manager Case.

Here the corporation learn of the fraud for the first time. It is willing to pay for just such a ditch as it contracted for, and, as the contractors declare upon the writen contract, it joins issue upon the question whether the work was constructed as thus agreed upon. But the court comes to the relief of the plaintiffs and allows proof of another contract —other than that set out in the pleadings.

While this action is brought under the code it is, never-

theless, essentially an equitable proceeding, and the Court will look into the whole record to see that ample justice is done. The complainants do not come into Court with clean hands. By the suppression of the truth they secured a settlement largely to their own advantage. The alleged acceptance and settlement were so tainted with fraud on the part of complainants as to vitiate their legality. The Company should not be bound by them.

A principal is bound by the act of his agent no further than he authorized that agent to bind him; and the fact of authority should be inquired into by the Court and jury.

Parsons *v.* Armor, 3 Pet., 413, and Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat., 326.

And the settlement which Mr. Strahorn made with the contractors, involving, as it did, the payment of a large amount of money on account of the enlargement of the dimensions of ditch, was in no sense a ratification of the acts of Col. Case and the contractors unless the facts were fully known to the Company.

In Owings *v.* Hull (9 Pet., 607), Judge Story, delivering the judgment of the Court, uses the following language:

"No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud."

The same doctrine is clearly held in Drakely *v.* Gregg, 8 Wall., 242; Stark *v.* Stark, 94 U. S., 477; Benneake *v.* Conn. Mutual Life Ins. Co., 105 U. S., 355, and many other decisions of this Court and State courts. Also see Greenleaf, 429, and Story on Agency, sec. 243.

In Telegraph Co. *v.* Thompson, a Pennsylvania case reported in 2 Cent. Reporter, 544, the Court holds that where the conduct of a company's superintendent in ratifying an action of the alleged agent is relied upon to bind the company it is competent to show that the superintendent had no authority to ratify.

An implied ratification must be based upon full knowledge of all the facts, and the burden is upon the party relying upon such a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent.

Hakes *v.* Myrick, 69 Iowa, 189, and Murray *v.* Nelson Lumber Co. (Mass), 3 N. E. Reporter, 419.

In this latter case it is clearly held that it is not sufficient to show that the directors, by the use of diligence, might have known of the contract. The party relying upon it must bring the knowledge home to them, and whether or not the Company had such knowledge is a question exclusively for the jury. There are no presumptions of law that the Company, or its directors, knew what they were able to know; and no inferences arise from the relation of the directors to the corporation as to the probability of their having a knowledge of the contract sued upon.

## V.

In conclusion:

The Court erred in allowing the plaintiffs to prove a contract other than the one set out in the complaint.

But having allowed testimony tending to show an oral contract between the agent of the Company and the plaintiffs, it should have permitted the proffered testimony tend-

ing to show that such contract was unauthorized, and that the fact of its existence was suppressed and never brought home to the knowledge of the Company.

W. C. HOLCOMB,
J. H. McGOWAN,
*Attys. for Plff. in Error.*

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IN THE

# Supreme Court of the United States.

October Term, 1889.

*No. 105.*

## THE IDAHO AND OREGON LAND IMPROVEMENT CO.

PLAINTIFF IN ERROR AND APPELLANT,

*vs.*

## W. C. BRADBURY and P. F. RINEHART.

# Brief and Argument in Opposition to Motion to Dismiss, and in Response to Defendants in Error and Appellees on the Merits.

C. W. HOLCOMB,
J. H. McGOWAN,
*Attorneys for Plaintiff in Error.*

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

# Supreme Court of the United States.

OCTOBER TERM, 1889.

THE IDAHO AND OREGON LAND IMPROVEMENT CO.,
PLAINTIFF IN ERROR AND APPELLANT,
*v.*
W. C. BRADBURY AND P. F. RINEHART.

*No.* 105.

*Answer to Motion to Dismiss.*

We find the motion to dismiss in the brief of counsel for defendants in error and appellees, although it was our understanding at the time the case was submitted on the merits that the court overruled the motion.

The motion rests solely on the fact that the certificate of the clerk of the lower court, found at the end of the record, is not *subscribed* by the clerk. The certificate is fully made out, is properly dated, bears the seal of the court. There is a line at the foot that might have been signed by the clerk, but was not. The rule cited as governing in this matter (Rule 8) does not prescribe that the clerk shall subscribe the certificate. It says he shall transmit "a true copy of the record, and of the assignment of errors, and of all pro-

ceedings in the case, *under his hand and the seal of the court.*"

Under this rule, and the statutory requirement on which it is based, this Court has held that the deputy clerk could properly certify the record.

In Secombe *v.* Steele (20 How., 94) a decree was found in the record that had not been signed by the judge. This Court found that, "the statute that directs the signature must be considered directory, and other evidence to establish its verity as a record of the Court may be considered."

The fact that the decree purported to be made by the court, that it was formal and was found in the record as one of the papers, was considered sufficient. In the certificate under consideration the name of the clerk is written in at the top, presumably by himself. It is in the first person and declares that, "I, A. L. Richardson, clerk of the Supreme Court of the Territory of Idaho, do hereby certify," &c.

If this is in the handwriting of the clerk is it not a compliance with the rule requiring the authentication *under his hand?* Is the counsel prepared to say that the clerk did not fill out the certificate? It certainly bears the seal of the court of which he is presumed to have the custody.

But we are not warranted in discussing further what we understand the Court has already practically decided.

If by any possibility the court should find the record too defective in this regard to proceed with the case on the merits, we ask leave to withdraw it for the purpose of getting the signature in question.

C. W. HOLCOMB,
J. H. McGOWAN,
*Attorneys for Plaintiff in Error.*

# Supreme Court of the United States.

OCTOBER TERM, 1889.

THE IDAHO AND OREGON LAND IMPROVEMENT CO.,
PLAINTIFF IN ERROR AND APPELLANT,

*v.*

W. C. BRADBURY AND P. F. RINEHART.

*No.* 105.

*From the Supreme Court of Idaho.*

Our opponents rest their case, as we understand them, on :

First, that the case in the district court was not tried by a jury.

Second, being tried by the court it can only be brought to this Court by appeal.

Third, coming here on appeal, the facts set forth in the statement made by the district judge are conclusive on this Court.

Fourth, that this Court, in this case, cannot look into the record to pass upon any matter except that found within said statement of facts.

Fifth, the statement of facts, as found by the Court, all being adverse to the contention of the plaintiff in error and

appellant, "it is about, *if not absolutely*, self-evident that the judgment below must be affirmed."

For the little clause in the above sentence which we have italicized we are thankful. It is encouraging to think that the learned counsel do not leave us "absolutely" without hope; and we are cheered with the further consideration that what is frequently "about, if not absolutely, self-evident" to counsel is not so self-evident to the Court.

Was the case below tried by a jury?

The Court who tried it says it was. In the very findings of fact, to which counsel proposed to hold as the only thing in the record binding upon this Court, the district judge very deliberately finds as follows:

"This cause came on regularly to be heard before the Court *with a jury*, and after hearing the pleadings, proofs, and arguments of counsel *the case was submitted to the jury* upon written and oral instructions by the Court and upon special issues, and the jury, after due deliberations, having found in favor of the plaintiffs upon all of the material issues submitted to them, *and said findings being adopted by the Court and made a part hereof, the Court* THEREFROM *makes the following findings of facts*" (Rec., 10):

A cause which comes on regularly to be heard before the Court with a jury, and which is submitted to the jury upon instructions from the Court, is ordinarily what is termed a jury trial.

On page 26, *et seq.*, will be found the instructions of the Court to the jury. In every one of these, four written, and one oral, charges, the jury are instructed to bring in a general verdict.

The oral charge, found at the bottom of page 27 and top of page 28, specially instructs the jury that if they are unable to find that Mr. Case was general manager of the defendant corporation at the time the change was made in the

contract, and to find that he authorized the changes, and the work done in accordance therewith, and a settlement afterwards made and the ditch accepted by the defendant—if they are unable to find all these facts, they must still bring in a verdict for the amount tendered by the new manager, Strahorn, together with 20 per cent. damages thereon for protest and damages.

The tender referred to is found in a letter of Strahorn, printed on page 18 of the record, and shows the tender to have been $4,274.49. The general verdict of the jury (Rec., 9) is "for $4,274.49 and 20 per cent. and interest from date of acceptance."

Now all this is hardly the case of a Court trying a purely chancery case and aided by a jury in finding answers to a set of special issues presented to them, and whose findings are simply advisory to the Court.

On the contrary it is doing just what the law of April 7, 1874 (18 Stat., 27), says what may be done in the Territorial courts. That statute provides that "common law and chancery jurisdiction may be exercised together in the same proceeding." The Court had before it one of those mixed proceedings, calling for a judgment on a contest concerning a contract, and for a decree in a foreclosure proceeding. The law question was tried with the jury. So far as appears from the record—and the instructions to the jury are conclusive on that point—everything necessary to pass upon the law question as distinguished from the chancery question, was submitted to the jury. It does not appear that the chancery matter, or any part of it, was given to the jury.

The Court understood that it was a case for a law judgment and a chancery decree. Accordingly, after setting aside the verdict of the jury, the Court entered a formal judgment quite separate and distinct from the decree (Rec., 28). The decree is found on page 11.

Again, the Supreme Court of the Territory expressly declare that "the case was tried by a jury," and that "the jury found a general verdict" (Rec., 42, 43). It also recognized that a law judgment and a chancery decree had been entered up in the case as two separate proceedings. The final action of that Court is found on page 41. The opinion of the Court is delivered to the effect "that the *judgment* of the court below be affirmed, and that the *decree* for foreclosure of mechanics' lien be modified so that the lien shall hold only for the judgment, less the protest damages, and, thereupon, it was adjudged and decreed that the *judgment* of the district court should be affirmed and the *decree* modified.

It is perfectly clear that all parties, including Court and counsel, understood that they were trying a mixed action, and at least attempted to try the law questions with a jury, leaving the other matters to the Court. The code of the Territory provided for such proceedings, and the statute of the United States authorized them.

But counsel say that, under the law of 1874, we must come here by writ of error, and lose all opportunity of having any review of the facts, or we must come by appeal and lose the advantages we otherwise would have by writ of error. This is making of the law of 1874 a trap. Complainants take us into Court with a mixed cause of action, where, as to one-half the issue, we are entitled to a jury. We have no option but to follow. The law allows such actions.

Now, in the case at bar, the questions of what was the contract and what was done in pursuance of it, were the only important ones to the defendant below. It only pleads to that part of the complaint which purported to set out the contract with the allegation that the work had been constructed according to its terms and a settlement had thereon.

In the 5th subdivision of the complaint (Rec., 2), the plaintiffs allege that "having completed said ditch in accordance with the terms and conditions of said contract and the supplement or amendment thereto, and the said ditch having been accepted by said defendant under the terms of said contract, the plaintiffs came to a settlement with the defendant of and concerning the said contract and the work and labor done by plaintiffs thereunder and in fulfillment thereof."

In the 6th subdivision plaintiffs allege:

"That upon said settlement it was ascertained, agreed, and understood by and between the plantiffs and the defendant that there was due and unpaid from the defendant to the plaintiffs *upon said contract* and for the work and labor done and performed by plaintiffs *thereunder* the sum of sixteen thousand seven hundred and seventy-four dollars and forty-nine cents ($16,774.49)."

The contract here referred to is the written contract described in the 3d subdivision of the complaint (Rec., 1), and set out in full (Rec., 4, 5, and 6), as a part thereof.

Now, the issue made by defendant's answer (Rec., 7) was squarely upon the allegation of the complainant concerning this contract and what was done or not done pursuant to its requirements. No defence whatever was set out to that part praying a foreclosure of the mechanics' lien. Upon this issue relating to the contract the defendants were entitled to a jury.

This was evidently conceded by the court and all parties. This part of the case—the "common law" part of the action—*was tried with a jury.* They were not called in to "advise the court," *but to try the cause.* The chancery part related simply to the foreclosure of the statutory lien, and the court needed no advice. The court and

the counsel of both sides sought a general verdict from the jury. A general verdict was rendered. That the court set it aside does not take the case out of the category of jury trials. Otherwise the Territorial courts could prohibit any jury case from being brought up for review on error by the simple expedient of setting aside the verdict and making a finding of facts.

A general appeal was sufficient under the Territorial law to take this mixed case, and the whole of it, to the Supreme Court of the Territory for review. When that court had acted upon it the counsel for the coporation were confronted with the question how to bring it to this Court so that all the alleged errors in the mixed proceeding in the district court could be reviewed. A writ of error would not do it, and an appeal alone would not do it. There had been a gross variance between the pleadings and proofs; one that resulted in nearly doubling the cost of the ditch to the corporation. An oral contract, differing materially from the written one declared upon, had been put in evidence in spite of the objection of the defendant corporation, and when the latter offered to show want of authority in the agent to contract, it had been denied. When it offered to show that the agent had no such authority, and that that fact was brought home to the plaintiff, that also was denied. Exceptions were taken to the various rulings of the court touching these things and went properly to the Supreme Court of the Territory in the record. That court found authority in itself to review them (Rec., 42).

Now, upon the authority of four cases, cited by opposing counsel, this Court is asked to dismiss the writ of error, and confine itself in the consideration of the case exclusively to the findings of fact made by the district court. The cases are:

1st. *Stringfellow* v. *Cain* (99 U. S., 610). In this case

there was no claim that there was a trial by jury in the lower court, yet the parties sought to bring it up both by writ of error and on appeal. This Court dismissed the writ of error.

2d. *Hecht* v. *Boughton* (105 U. S., 235). That case came here by writ of error alone, although there was no jury trial.

3d. *Gray* v. *Howe* (108 U. S., 13). There was no jury in that case below; it was properly brought here by appeal; this Court took jurisdiction and decided the case.

4th. Is the case of *Davis* v. *Fredericks* (104 U. S., 618). This case came here on appeal without question apparently from any source. In the statement of the case, made by Chief-Justice Waite, the fact appears that the jury was "impaneled to try certain questions prepared and submitted to them."

Neither of these cases is on all fours with the case at bar. Only one (Stringfellow *v.* Cain) came up on both error and appeal, but as no jury appeared in that case at any stage of the proceedings, the writ of error was dismissed, of course.

The question now presented is whether the Court will review a case where "common law and chancery jurisdiction" has been "exercised together in the same proceeding," and one part of the issue tried by a jury, and the other by the Court, and brought here, under the act of 1874, both by writ of error and appeal. So far as we are able to find this question has not heretofore been presented to this Court.

We make no contention with our brethren of the opposition as to the construction which this Court has given the act of 1874 in the cases of *Hecht* v. *Boughton* and *Stringfellow* v. *Cain*. The rule seems to be well established that where cases are properly here from Territorial courts by appeal, the facts as found by the lower court are conclusive on this Court.

But this Court has not said that a mixed proceeding such as the statute authorizes shall not be brought here by both appeal and error. If we are right in our statement that the case at bar was tried by a jury, certainly the writ of error should not be dismissed. But an essential part was also tried by the Court. Why dismiss the appeal?

This Court will generally do whatever it may within the statute and Constitution to render justice to litigants. It will ordinarily look into the whole record that equity may be done.

If the construction, which is contended for, should be given to the act of 1874, and the writ of error dismissed, then the position is that this Court could not review the action of the district court in permitting proofs at variance with the pleadings, and in rejecting proffered testimony to show that the corporation had given no authority to its agent to change the contract. The Supreme Court of the Territory found authority to review the rulings of the lower in admitting and rejecting evidence (Rec., 44, 45). It would be anomalous, indeed, if the case could not be as thoroughly reviewed here as by the court from which it was brought here. On pp. 44 and 45 of the record the Supreme Court says: "We are of the opinion that exceptions to the ruling of the Court in admitting or rejecting evidence may be considered on a statement, where a statement is authorized, the same as in a bill of exceptions."

On p. 29, *et seq.*, of the record will be found the specifications of error filed in the district court by the defendant below on the motion made for a new trial. The first five "errors of law" fully set out the rulings of the court on the admission and rejection of evidence to which the defendant excepted. This bill of exceptions and specification of errors is endorsed by the court as follows: "The within proposed statement examined and settled and signed *as the*

*statement of the case*, Sept. 16, 1885, Case Broderick, district judge." Here the Supreme Court of the Territory found the authority to review the whole case and did so review it.

We suggest that if the writ of error herein had not been taken out, and the case appeared here solely on appeal, this "statement of the case," duly signed by the district judge, should be taken as part of the findings provided for in the proviso to the second section of the act of 1874:

"That on appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, *and also the rulings of the court on the admission or rejection of the evidence when excepted to*, shall be made and certified by the court below," &c.

Is it material for what purpose the certificate of the court was made? If it is found in the record, is not that sufficient? The statute simply requires the court to certify to two things: 1st, a statement of the facts in the nature of a special verdict; and 2d, as to the rulings of the court on the admission or rejection of the evidence when excepted to. It cannot be of consequence that these two things are put in separate certificates. Is it of consequence that one certificate was made on the motion for a new trial, so long as both are in the record and substantially fulfil the requirement of the statute?

Our position then in the whole matter is this:

1st. That the mixed proceedings on the original trial were legal.

2d. That the law question was properly tried by a jury and the chancery question by the court.

3d. That in order to have a review by this Court of both branches of the proceedings before the district court, it is necessary to bring both error and appeal.

4th. That neither the statute nor the decisions of this Court prohibit this course.

5th. If, however, the Court should find that the case at bar was not tried by a jury, and should dismiss the writ of error, yet the record will warrant a review of the whole case, and especially of the rulings of the district court on the admission and rejection of evidence.

6th. The Court having reached the conclusion that it may review the rulings of the district court concerning the admission and rejection of evidence, we cheerfully leave the questions then presented to the presentation found in our first brief.

C. W. HOLCOMB,
J. H. McGOWAN,
*Attorneys for Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

October Term 1889.

No. 105.

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, Plaintiff in Error and Appellant,

*vs.*

W. C. BRADBURY and P. F. RINEHART, Partners under the firm-name of BRADBURY & RINEHART.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

MOTION TO DISMISS.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

BRIEF FOR APPELLEES.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON.

THOMAS MCGILL & CO., Printers, Washington, D. C.

IN THE

# Supreme Court of the United States.

**October Term 1889.**

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, Plaintiff in Error and Appellant,

*vs.* No. 105.

W. C. BRADBURY and P. F. RINEHART, Partners under the firm-name of BRADBURY & RINEHART.

**Appeal from the Supreme Court of the Territory of Idaho.**

***Motion to Dismiss.***

Now come the appellees, and move the court to dismiss this case, upon the ground that the record, filed in the case, was not authenticated as required by section 997 of the Revised Statutes of the United States, and Rule 8 of this court.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
*For Appellees.*

IN THE

# Supreme Court of the United States.

**October Term 1889.**

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, Plaintiff in Error and Appellant,

*vs.* No. 105.

W. C. BRADBURY and P. F. RINEHART, Partners under the firm-name of BRADBURY & RINEHART.

**Appeal from the Supreme Court of the Territory of Idaho.**

***Brief in Support of Motion to Dismiss.***

An inspection of the original record filed in this case will show that it was sent here without any signature whatever of any clerk or deputy clerk to the certificate at the end of the record, although there is a seal of the court attached.

The statute regulating this matter is section 997 of the Revised Statutes, and is in these words:

"There shall be annexed to and returned with any writ of error for the removal of a case, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

The question presented by the absence of the clerk's signature is, whether a transcript sent here, without any signature of the clerk whatever, is an authenticated transcript within the meaning of these words in this section, as that meaning has been settled by the rules of this court and by your practice.

The language of Rule 8 as to the point what is an authentication, is that it must be "under his" (the clerk's) "hand and the seal of the court."

Whether without his hand and with the seal the authentication is good, is not a matter of doubt, since it is determined, not only by the practice of the court, but by its decision, in the case of Blitz *v.* Brown, 7 Wallace, 693.

There was attached, in that case, to the transcript only a blank form for the certificate of authentication, but without the seal of the court or the signature of the clerk. Regarding the character of this authentication, Chief Justice says:

"The filing of such a paper as has been filed in this case is not the filing of the transcript at the next term, after the issuing of the writ of error, without which we have no jurisdiction of the case. The motion to dismiss must be allowed."

This, therefore, is a decision that "the filing of such a paper" as had been filed in that case was not a filing of a "transcript."

On the proposition that the filing of a transcript, duly authenticated within the time prescribed by the statute or the rule, all the authorities show that the failure to file within the prescribed time is fatal to the case, and results in a total absence of jurisdiction to proceed, without taking a new writ of error.

Justice Miller, in the case of Edmonson *v.* Bloomshire, 7 Wallace, 306, 309, and 310, states the law on this point thus:

"Other cases followed that, and in Mussina *v.* Cavazos, decided at the last term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case, unless the transcript be filed during the term next succeeding the allowance of the appeal."

This opinion by Justice Miller cites the authorities fully on the subject, and, of course, it is now the unquestioned law of this court that the failure to file a transcript, such as the law requires and recognizes as a transcript, within the prescribed time, results in a vacation of all jurisdiction of the court over the case.

The vital importance of this signature of a clerk or a deputy clerk, empowered, under the statute, to give, by his official signature, authentication to the transcript which is required by section 997 of the Revised Statutes and by Rule 8 of this court, is recognized and in legal effect asserted in a multitude of cases, especially in that class arising where the question was whether a deputy could sign instead of the clerk. Such cases as this are found in the cases of Garneur *v.* Dozier, 100 U. S., 7, and Florida Central R. R. *v.* Shuttle, Id., 644.

And in the case of Missouri, Kansas and Texas R. R. *v.* Dinsmore, 108 U. S., 31, the opinion of the Chief Justice recognizes the necessity for such certificate as one that goes to the matter of jurisdiction. In that case the certificate was in the words asserting that the record was "a true, full, and perfect copy of the record of all the proceedings in the suit." The question made about it was, that it was an imperfect certificate in its terms. The court held it sufficient, and, in so holding, used this language:

"Certainly this is sufficient for all the purposes of jurisdiction. If, in point of fact, the certificate is not true, the remedy is by *certiorari* to supply the deficiencies, and not by a motion to dismiss."

We do not deem it needful to pursue this matter farther, and conclude as to the matter of the dismissal of this suit, by saying that the decree appealed from is dated March 8, 1886. It is much more, therefore, than two years since the said decree was rendered, and it is now too late to sue out a new appeal or writ of error.

We ask, therefore, that the case may be dismissed.

SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
*For Appellees.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM 1889.

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, Plaintiff in Error and Appellant,

*vs.*

W. C. BRADBURY and P. F. RINEHART, Partners under the firm-name of BRADBURY & RINEHART.

No. 105.

## Appeal from the Supreme Court of Idaho.

Any defects which this brief may disclose in failing to notice all points in the case, or any inaccuracies which may intervene, and which, by industry, could be avoided, are attributable to the want of time to prepare it, after the opposing brief was filed, on Tuesday, November 12, 1889, shortly before 12 o'clock.

So far as we or the profession generally could tell, the case was so nearly reached when said brief was filed that it was liable to be called at any time.

Under the rule of the court we were compelled, at peril of losing the case, to prepare this brief within a few hours.

Still, we do not apprehend that any harm will come to the case from this cause, because we think the points

that control it are not numerous, and not difficult of presentation to the court.

This presentation we now attempt.

The first thing we shall consider is as to what is the character of this case, so far as relates to the class under which it comes, of the two classes of territorial cases created by section 2 of the act of April 7, 1874 (18 Stats., 27).

That section, in its first proviso, enacts, in the following words—

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and, also, rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

In regard to the design of this section in the particular which we now desire to notice, this court, in Hecht *v.* Boughton, 105 U. S., 236, use the following language:

"This statute seems to us conclusive of the present motion. In allowing legal and equitable remedies to be sought in the same action before the territorial courts, Congress saw fit to establish an *inflexible rule* by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by jury should come on writ of error and all others by appeal. This makes the former proceeding depend on the single fact of whether there has been or not a trial by jury. (Stringfellow *v.* Cain, 99 U. S., 610.) *We are not to consider the testimony in any case.* Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to *the statement of facts* and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Under these circumstances, the former proceeding to get a

review is not of so much importance as certainty about what is to be done."

Here, as is perceived, the court construes the statute as dividing all cases, in the territories coming under section 2 into two classes, by the establishment "of an inflexible rule by which it could be determined whether a case should be brought here from those courts by review or writ of error or appeal, and provided that cases tried by a jury should come on a writ of error, and all others by appeal."

Although hardly requisite, yet, by way of showing how amply the decisions construing this statute cover the present point (namely, that all cases not tried by a jury can only come here upon findings of fact in the nature of a special verdict), it is appropriate to here give extracts from the further rulings of this court on the subject.

The first case in which this question arose was Stringfellow *v.* Cain, 99 U. S., 610, where you held what is expressed in the syllabus, as follows:

(1) That in a case not tried by a jury your appellate jurisdiction can only be exercised by appeal.

(2) That the Supreme Court of the Territory, on such appeal, was called upon to decide whether the evidence, disclosed by the "statement for appeal," was sufficient to sustain the findings of fact, and, if it would, whether they (the findings of fact) would support the judgment.

(3) That if the Supreme Court of the Territory reversed the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a *condition for hearing* in the Supreme Court of the *United States;* but if it has all the evidence which could be considered below—should the case be remanded—the Supreme Court of the Territory can state

the facts established by the evidence, and render a judgment. On appeal to the Supreme Court of the United States, the case, if otherwise properly here, will be determined upon the facts so stated.

(4) That if the findings of the District Court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the Supreme Court of the Territory, and they (the facts so adopted by the Supreme Court of the Territory), for the purposes of an appeal to the Supreme Court of the United States, furnish a sufficient statement of the facts of the case within the meaning of the act of April 7, 1874.

Again, in the case of Neslin *v.* Wells, 104 U. S., 429, in the opinion by Justice Matthews, the same thing is repeated in the following words:

"Under the second section of the act of Congress of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), concerning the practice in territorial courts and appeals therefrom, as explained in Stringfellow *v.* Cain (99 U. S., 610), the present appeal rightly brings into review the decree of the territorial Supreme Court, affirming the decree of the District Court; but we are *not at liberty* to consider *anything*, as embraced in the statement of the facts, required by the statute, *except the special findings* of the District Court, adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of the exceptions taken in the District Court in the course of the trial, and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves, as the *sole* question for determination here, whether the *facts, as found, justify the decree sought to be reversed.*"

This doctrine is again repeated in Davis *v.* Fredericks, 104 U. S., 618.

Again, in Gray *v.* Howe, 108 U. S., 13, the same thing

is repeated, in the opinion by Chief-Justice Waite, as follows (p. 78):

"Since the act of 1878, *supra*" [mistake, 1874 is the statute named, *supra*], "*the evidence at large is not to be transmitted here from the courts of the Territories;* but, in lieu of the evidence, 'a statement of the facts of the case, in the nature of a special verdict.' In Stringfellow *v.* Cain, 99 U. S., 610, it was held, if the findings of the District Court were sustained, and a general judgment of affirmance rendered in the Supreme Court, the findings of the District Court, thus approved by the Supreme Court, would furnish a sufficient statement of facts for the purposes of an appeal to this court."

This case further decides what is thus expressed in the headnote:

"Where the Supreme Court of a Territory on appeal reverses the judgment of a District Court, and *sets aside* findings of fact, in the nature of a special verdict, the judgment of the Supreme Court of the Territory *must be affirmed on appeal.*"

Then, again, in the case of Eilers *v.* Boatman *et al.*, 111 U. S., 357, the court, in the opinion by Miller, J., repeats, in substance, the same thing, where he says:

"By chapter 80 of the act of Congress approved April 7, 1874 (18 Stats., 27), this court is *required to accept the findings of fact by the Supreme Court of the Territory as true on appeal to this court.* (See Stringfellow *v.* Cain, 99 U. S., 610; Hecht *v.* Boughton, 105 U. S., 235.)"

The same thing is decided in Cannon *v.* Pratt, 99 U. S., 619, and in United States *v.* Hailey, 118 U. S., 233.

And in Story *v.* Black, 119 U. S., 235, you held that—

"When a jury is waived in a territorial court in the trial of *an action at law*, the case cannot be brought up for review by writ of error, but must, under the act of April 7, 1884, c. 80 (18 Stat., 27), come, if at all, by appeal, as provided in that act."

In Murray *v.* Ramsey, 114 U. S., 35, you decide the same point, the words of Justice Matthews' opinion being:

"These cases, although actions at law, were not tried by a jury, and therefore are rightly brought here by appeal, according to the provisions of the act of Congress of April 7, 1874." Citing 99 U. S., 610; 105 U. S., 235; 108 U. S., 15.

It is thus demonstrated by these decisions that the rule is (here adopting the language of the court in Hecht *v.* Boughton, 105 U. S., 236) that this statute does indeed establish an *inflexible* rule by which it could be determined whether a case should be brought to this court by appeal, and provided that cases tried by a jury should come by a writ of error, and all others by appeal.

It will be seen by an inspection of this record that, on the part of the appellants, there is an attempt to make this case to be one brought to this court *both* by a writ of error and by an appeal—to be a case tried by a jury, and *not* tried by a jury. For example: On page 46 of the Record citation appears, pursuant to a *writ of error* filed in the clerk's office of the Supreme Court of the Territory, and, in that citation, the decision of the court is called *both* a judgment and decree. On page 47 of the Record appears an allowance of an *appeal* and a citation in appeal.

This equestrian attempt at riding, at the same time, in two opposite directions cannot, under the operation of the statute and the decisions referred to, be successful.

The trial, in other words, cannot, for the purposes of review here, be mongrel, uniting the qualities of a trial by jury and a trial by the court. It must belong *wholly* to one or the other of those two classes; and the test as to which one it shall be classed with is not in the question whether it was an action *at law*—where a jury trial

would be appropriate—nor, on the other hand, a case in equity—where a jury trial is not a matter of right—but the test is, was it tried, on *all questions* of fact, by a jury, so that, on the verdict of the jury, whether general or special, a complete judgment could be rendered.

If it was so tried, then the writ of error is the only method of bringing the case here.

If not so tried, but tried by the court, the court, (though aided by a jury in finding answers to a set of special issues presented to the jury, and which, as findings by the jury, are only advisory to the court,) and if the court did, in fact, by assent of the parties, find the facts, either by "*adopting*" the findings of the jury, in whole or in part, or by its own independent weighing of the evidence—then the case is not one tried by a jury, but by the court, and must be brought here by appeal, and subject to all the requirements of section 2 of the said act of April 7, 1874.

This matter of making the test of whether it is a case for appeal or for a writ of error is especially enforced by the decision in Story *v.* Black, 119 U. S., 235, *supra.*

Next observe what happened in this case, in regard to the mode of trial, so far as this is disclosed by the Record.

On pages 8 and 9 of the Record appears the special findings by the jury. These findings by the jury appear to have been found on questions numbered from 1 to 8, inclusive, which were submitted by the plaintiff.

The special findings, as well as the general verdict, recorded at folio 23 of the Record, page 9, seem to have been found and filed July 1, 1885.

Afterwards the court proceeds to find the facts and the conclusions of law, in the absence of the jury, and after the jury's findings were filed. These findings by the court were filed July 8, 1885. (R., 11.)

The findings by the court, both of fact and law, are found in Record, 10 and 11.

The decree of the court is at pages 11 to 13, and was made July 8, 1885.

And in the decree it is declared that the decree is based upon the proofs and evidence produced by the respective parties; and that the court had heard the necessary proofs to enable it to render judgment; and that it appeared to the court from such proofs that there was due, from the defendants to the plaintiffs, $10,107.52; and decrees that so much of the premises described in the petition as was necessary to raise the money to pay the plaintiffs the principal, damage, interest, costs, and expenses of sale, should be sold at public auction, under the direction of the sheriff, &c., and directs how the sheriff should apply the money, including the payment of costs, interest, and the said debt, as found by the said court.

It then proceeds to provide for the discharge of liens on the premises, &c., &c., and then decrees that the purchasers should receive possession, and the defendants surrender possession to such purchasers on production of the sheriff's deed; and provides as to how a judgment for any balance that might not be paid by the sale should be obtained.

This character of the decree is referred to for the purpose of fixing, still more effectually, upon this proceeding the character of a proceeding in equity, as it is, in effect, declared to be in the opinion of the Supreme Court (R., 44, fol. 114), and as it is declared to be in the opposing brief (bottom of p. 17 to top of p. 18).

So far as the Record discloses, the court entered upon the findings of fact as in ordinary cases, and resorted to the special findings by the jury as advisory to the court, sitting as a court of chancery in an equity cause, though it does appear, from the fact that a general verdict was rendered, that there was an attempt to then ascertain the actual indebtedness—this, of course, only in aid of and

as *advisory* to the court. Besides this, the character of the petition and case made by it for foreclosure of a lien makes it to be a case in equity in its intrinsic and essential nature.

These characteristics of the case being observed, it is proper here to carefully state what our purpose is in alluding to the facts and features showing this to have been *treated* as a case *in equity*, and to have *been* such, and to state what we claim to be the effect of these facts upon the case, to wit, the fact that it is *essentially* a case in equity; that the parties so dealt with it; that it was so presented in the petition for foreclosure of the mechanic's lien; that the court was permitted to enter upon the findings of fact after the verdict, general and special, by the jury, was rendered.

Our purpose in presenting them is *not* for the purpose of claiming or asserting that it is *incompetent* for the court, under section 2 of the act of April 7, 1874, to submit a chancery suit for the findings of fact to the jury and to bring it to this court on a writ of error. On the contrary, our purpose is—

*First.* To show that the parties *have not* so dealt with the case as to submit the finding of *all* the facts, necessary to a perfect decree in the case, to a jury, and, on the contrary, have submitted at least part of the findings to the court. The Record is, as to this part of the case, most obscure, but it shows that, until after the court made its findings of fact, the parties made no effort to have jury findings as to those essential facts as to which the jury disagreed, or, indeed, as to any other.

*Second.* To show that the court has found the facts in this case, without any disclosed objection prior to such findings being so made by the court.

*Third.* That the facts were not found by the jury, fully

and completely, so as to cover all the questions raised by the testimony, nor so as to enable any decree of foreclosure to be rendered in the case. The general verdict simply found a named balance to be due, and no fact whatever was found by the jury in regard to liens or in regard to other essential facts.

*Fourth.* Our especial purpose in alluding to the state of the pleadings, this equitable character of the case and nature of the evidence admissible under the pleadings, is to show the *range* and scope of evidence which was permissible under the issues made in this essentially chancery case.

What we have now stated being kept carefully in view, we are prepared to state our propositions of fact and law in reply to the opposing brief and to the case of plaintiffs in error.

I.

We wish to remark, first, in regard to all the contentions made in the case alleging that there was error in setting aside the general verdict because of its conflict with the special verdict, and in regard to the character of evidence that was admissible in the case on the change of the contract, and in regard to the contention that the court's findings "purported to be based upon the special findings by the jury," and alleging that the court's findings are not sustained by such special findings, and in regard to every other contention in the case in conflict with the proposition we now state.

We submit our first proposition as follows:

That the court being entitled to find the facts in the case, either with or without the aid of a jury, and having called the jury to its aid, is *not bound* by the findings of the jury, and can make its own findings for itself, either in conflict with the findings of the jury or otherwise, as

the court may feel warranted to do, in the light of all the evidence, including whatever force, of an *advisory* nature, the court might choose to give to the special findings by the jury.

In support of this proposition we refer the court to the following cases:

In the case of Bates *v.* Gage, 49 California, 126, the syllabus is in the following words:

"The findings of a jury on special issues submitted in an equity case *are merely advisory to the court, and, if adopted by it, are the findings of the court.*"

And in the body of the opinion, by McKinstrey, J., the court say:

"The verdict was but *advisory, so that all the issues were determined by the court.*"

In the case of Still *et al. v.* Sanders *et al.*, 8 California, 281, the syllabus states the rule as follows:

"The verdict of a jury in a chancery case is only *advisory* to the chancellor, or this court" (the Superior Court of the City of San Francisco).

II.

Our next proposition—quite kindred to the one just stated, is that, where the court is entitled to find the facts, as it was in this case, by at least tacit consent of the parties, (such consent continuing until the findings proved to be adverse to the defendant,) and as the findings of the jury are not binding on the court, therefore, the matter of the alleged error of the court in admitting testimony to be heard by the jury is not a matter upon which a judgment will be reversed, *unless* it appears, (from all the evidence in the case,) to the reviewing court, that the findings by the court and the admission of the incompetent evidence have resulted in injustice. And whether it resulted in

injustice or not, will entirely depend upon all of the facts as admitted and proved, and not at all upon the verdict of the jury.

The proposition just stated is explicitly held in the case of Still *et al. v.* Sanders *et al.*, *supra*, where the court, in the body of its opinion, uses the following language upon this point:

"As the verdict of the jury was but *advisory*, and not conclusive upon the chancellor, or upon this court, the improper testimony and the erroneous instructions could do the party no injury *if justice has been rendered him in the final result.* And whether justice has been correctly administered or not, entirely depends upon the facts as admitted and proved, *and not at all upon the verdict of the jury.*"

III.

Our next proposition we state thus:

That the opposing brief has, as we submit, fallen into error in assuming, as it does, that the suit below was one *brought upon the written contracts* (Exhibits A and B) for making the ditch, as found at pages 4 and 5 of the Record.

On the contrary, the case made by the petition is one to enforce a mechanic's or laborer's lien, as secured by the instrument, found at page 24 of the Record, and for the collection of whatever indebtedness was yet embraced by said lien and unpaid, and which was claimed to be a balance secured by the acceptance for $6,774.49, and 20 per cent. damage, as provided by the statute, and interest, and for the satisfaction of any other lien-holders on said property covered by the lien, who might come in, be made parties, and obtain judgment. *The existence of the contract and the doing of the work thereunder were rendered indispensable averments, not by the fact that the suit was based on the contract as the cause of action, but by reason of the fact that the suit was based on the mechanic's lien, and the*

*statute made such contract and the proof thereof indispensable to such lien.*

The averments of the petition, at all points, were appropriate and adequate to support a case such as is covered by the prayer to this petition. The petition does not stop, by any means, at averring the making and performance of the contracts Exhibits A and B, but it proceeds to aver the *settlement* which resulted in ascertaining the indebtedness to be $16,774.49, the payment of the $10,000 of that indebtedness, the nonpayment of the check for said $6,774.49, and the making out and taking of the said lien.

Hence, all that is said about there being a *variance* between the evidence and the averments in the petition, as to the *complete* performance of the contract, and, also, about there being an unauthorized *change* in the character of the ditch called for in the contract, and about error in admitting evidence as to such *change*, and other kindred positions of the plaintiffs' brief, fall to the ground.

The petition really counted on and for $6,774.49, this being the amount of the protested check. The defendants denied, in their answer, this indebtedness, and denied *all* indebtedness in excess of $500. It also alleged a want of consideration for the said $6,774.49 check.

If the contract was not lived up to, that was a matter of *defense* to said check. The making of said settlement, and the payment of $10,000, constituted, as to that much of the debt, both an accord and a satisfaction, and the settlement constituted an accord as to the whole. All the evidence admitted in the case and relating to such accord, *pro* and *con*, was perfectly competent.

We will not, therefore, descend to *particulars* in regard to the said alleged variance, the said want of authority to make said change in the contract, and the admission of evidence tending to establish or to disprove the indebtedness, as disclosed in the opposing brief.

These and many similar questions are covered by the proposition which we have now stated.

We have, however, been favored with an able brief prepared for, and used in, the Supreme Court below by attorneys for the plaintiffs below, Messrs. HUSTON AND GRAY, and we cannot do better than here introduce the following from that brief. The points in the present trial, on which the propositions and authorities which we here quote from said brief, are obvious, and we need not specify them.

There having been no exceptions taken to the verdicts, findings of fact, or conclusions of law, the assigned errors thereto will not be considered by this court.

Cogland *v.* Beard, 7 Pac. R., p. 738.
Ainslie *v.* Idaho World Pr. Co., Idaho, R. 641.
People *v.* Hunt *et al.*, Id., 433.
Fox *v.* West, Id., 782.
Guthrie *v.* Phelan, 6 Pac. Rep., 107.
Young *v.* Martin, 8 Wall., 354.
Bacon *v.* Robson, 53 Cal., 399.
Thatcher's Pr., p. 303, secs. 75, 81.

There being no exceptions to the findings, this court will presume that they are supported by the evidence.

Moys *v.* Griffith, 35 Cal., 556.
Hastings *v.* Cunningham, Id., 549.
Wilson *v.* Dougherty, 45 Cal., 34.
Putnam *v.* Lee, 7 Pac. R., 172.
Merrill *v.* Chapman, 34 Cal., 251.

To be of any avail, exceptions must be drawn up so as to present distinctly the ruling or point raised, and must be signed by the presiding judge.

Young *v.* Martin, 8 Wall., 354.
Thatcher's Pr., p. 300, secs. 62 and 63.
Id., 304, secs. 83 and 85.

The transcript does not purport to contain *all* the evidence in the case.

Where the statement or bill of exceptions does not purport to set out all the evidence given on the trial, an appellate court will not reverse the judgment for an instruction which depends upon the evidence for its correctness.

Thatcher's Pr., p. 300, secs. 63 and 65.
Wiggins *v.* Burkham, 10 Wall., 129.

There was no exception taken at the time to the setting aside the general verdict.

The order setting aside the general verdict is no part of the judgment roll.

Harper *v.* Minor, 27 Cal., 107.

In equity cases like this the verdict is merely *advisory;* the judge may qualify, alter, or set aside the verdict and find the facts.

Sweetzer *v.* Dobbins, 4 Pac. R., 540.
Bates *v.* Gage, 49 Cal., 126.

When a jury renders a general verdict and a special verdict, the latter will control the former if there is any inconsistency between them.

Lees *v.* Clark, 20 Cal., 387.
Code Civil Pro., sec. 385.

The evidence of the witnesses, Bradbury and True, objected to by defendant, *is competent.*

The plaintiffs alleged in the complaint the execution of the contracts "A" and "B," the completion of the ditch, acceptance of the same by defendant, and a settlement between plaintiffs and defendant; that there was found due plaintiffs the sum of $16,774.49; that a check for $5,000 was given at the time of such settlement, which was paid on presentation—two bills of exchange drawn

on the banking-house of T. R. Jones & Co., of Hailey, one for $5,000, accepted on four days, which was paid at maturity, and one for $6,774.49, accepted on fifteen days, which was not paid, went to protest, plaintiffs claiming the amount of said last acceptance being due them, with damages and costs. Defendants denied in their answer the indebtedness in excess of $500, and alleged *want of consideration for said acceptance* by reason of fraud in the said settlement. Under the issues as made by the pleadings, it became necessary for *plaintiffs to prove* the consideration for the amount found due on said settlement between plaintiffs and defendant.

As we have before stated, the contracts are set out in complaint for the purpose of obtaining the equitable relief—the foreclosure of the mechanic's lien.

The admission of the testimony could do defendant no harm.

The admission of testimony, if irrelevant and immaterial, which is manifest, could not have affected injuriously the case of appellant; is no ground for the reversal of the judgment.

Thatcher's Pr., p. 153, sec. 20.
Mining Co. *v.* Taylor, 10 Otto, 37.
Moore *v.* Moore, 7 Pac. R., 688.

There was no error in sustaining the objection to the several questions asked the witness Strahorn.

Plaintiffs had made the contract Exhibit "A" with said W. G. Case, he acting for defendant. If Case, as manager for the defendant, had authority to make the contract, he had authority to authorize a change in the size of the ditch. It did not nullify the contract, only directing some extra work under the contract. It does not appear that the ditch was constructed larger at the suggestion of plaintiffs, or that there was fraud or collusion between plaintiffs and said Case.

The evidence could not in any way establish a defense to the bill of exchange or acceptance, the foundation of this action.

2 Chitty on Contracts, secs. 825 and 1,140, note A.

The findings show that the work was accepted by said Strahorn, agent of defendant, and a settlement made with plaintiffs under their contracts. Defendant took possession of the ditch, appropriated it, and has used it ever since the 1st day of June, 1883, the day of the acceptance.

The bill of exchange sued upon was given for the balance found and agreed to be due from defendant to plaintiffs upon an executed contract, and against such bill no other defense than fraud is permissible. No fraud was proven, or attempted to be proven, although it is alleged in the answer. (See testimony of Strahorn.)

2 Chitty on Con., 1,140, note A.
*Id.*, 825.

A corporation that has received and retained the consideration of a contract for its benefit cannot deny its liability thereon on the ground the contract was *ultra vires.*

Main *v.* Casserly, 7 Pac. R., 426.
Sedgwick on S. and C. L., 73.
Bradley *v.* Ballon, 55 Ill., 413.
Pixley *v.* Western P. R. Co., 33 Cal., 198.
Foulke *v.* San Diego R. R. Co., 55 *Id.*, 365.

A party who complains of the rejection of evidence must make it appear by his bill of exceptions or statement that, if the evidence had been admitted, it might have led the court or jury to a different result.

Thatcher's Pr., p. 302, sec. 72.
Packet Co. *v.* Clough, 20 Wall., 528.
Roberts *v.* Unger, 30 Cal., 676.

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As we have before stated, the contracts are set out in complaint for the purpose of obtaining the equitable relief—the foreclosure of the mechanic's lien.

The admission of the testimony could do defendant no harm.

The admission of testimony, if irrelevant and immaterial, which is manifest, could not have affected injuriously the case of appellant; is no ground for the reversal of the judgment.

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Packet Co. *v.* Clough, 20 Wall., 528.

Roberts *v.* Unger, 30 Cal., 676.

There was no error in the charge of the court to the jury.

The exception to the charge is in general terms, and does not point out wherein they are objectionable.

Thatcher's Practice, p. 305, secs. 88, 89.

Where the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which properly could have been given, or that some of those given are subject to verbal criticism.

Evanston *v.* Gunn, 9 Otto, 660.
Thatcher's Pr., p. 153, sec. 19.
Brooks *v.* Crosby, 22 Cal., 42.
Conroy *v.* Duane, 45 *Id.*, 597.
Simers *v.* Eisen, 54 *Id.*, 418.
Higgins *v.* Dewey, 9 Am. R., 63.

This ends our quotation.

We now call further attention to the fact that this record does not contain, nor purport to contain, *all* the evidence that was heard by the court.

We further call attention to the fact that the accusations of fraud, contained in the opposing brief, are vehement in the precise ratio in which there is an absence of all evidence of fraud, and justification for such accusations.

We call attention to the further fact that if the record did contain *all* the evidence, this court, on this appeal, could not read it, but must be governed by the facts found by the court.

See above authorities from this court relating to the section 2 of the act of April 7, 1874.

We also call attention to the further fact that such findings by the court expressly negative, in finding 3 (R., 10, folio 35,) all accusations of fraud, where it says:

"There was no fraud or misrepresentations on the part of the plaintiffs, in or concerning said settlement."

It is not needful that we should copy into this brief the findings of fact by the court. They do not purport to be based upon the special findings by the jury, but purport to be based upon the "hearing of the pleadings, proofs, and arguments of counsel," and upon the "adoption" by the court, as its own findings, the findings of fact by the jury. (R., 10, folio 24.)

In view of these findings by the court, at pages 10 and 11 of the Record, *and which must constitute the sum total of all facts of which this court has jurisdiction to take cognizance*, it is about, if not absolutely, self-evident that the judgment below must be affirmed, if affirmance or reversal depend upon the state of the facts in this case as found by the court.

The exceptions preserved during the trial, and proper for consideration here, are sufficiently covered by the extracts which we have made from the brief of counsel of record in the Supreme Court of the Territory, and we here submit the case.

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